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IN THE

Supreme Court of the United States

October Term, 1984

ROBERT ABRAMS, Attorney General of the State of New York,

Petitioner,

—*v.*—

MICHAEL McCRAY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the sixth amendment right to trial by jury, made applicable to the states through the fourteenth amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968), prohibits the use of the peremptory challenge in a criminal case, by prosecutors or defense counsel, to exclude prospective jurors solely on the basis of race.

2. Whether the equal protection or due process clause of the fourteenth amendment prohibits the use of the peremptory challenge, by prosecutors or defense counsel, to exclude prospective jurors in a particular case solely on the basis of race, notwithstanding the holding in *Swain v. Alabama*, 380 U.S. 202 (1965), that such exclusion would constitute a denial of equal protection only when it occurred on a systematic basis in case after case over a period of time.

3. Whether the record of this state criminal trial establishes a prima facie case that the prosecutor impermissibly used peremptory challenges to exclude potential jurors on the basis of race, when the prosecutor challenged white as well as black jurors, elicited information on voir dire that provided nonracial reasons for the challenges, and denied that the challenges were based on race.

4. Whether a federal court may set aside a state criminal conviction if the defendant makes a prima facie showing of discrimination in the use of peremptory challenges, unless the state can sustain not merely the burden of coming forward with a legitimate nondiscriminatory explanation but rather the ultimate burden of proving nondiscrimination.

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Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 4, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

New York Crim. Proc. Law:

> § 270.25 Trial jury; peremptory challenge of an individual juror.
>
> 1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.
>
> 2. Each party must be allowed the following number of peremptory challenges:
>
> > (a) Twenty for the regular jurors if the highest crime charged is a class A felony, and two for each alternate juror to be selected.

(b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected.

(c) Ten for the regular jurors in all other cases, and two for each alternate juror to be selected.

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Statement of the Case

State Court Proceedings

Michael McCray was convicted after a jury trial of a gunpoint robbery of Philip Roberts in downtown Brooklyn on the evening of November 15, 1978. McCray and two companions [1] watched Roberts, a white art student, withdraw money from a bank cash dispensing machine, and then pushed him into the vestibule of an apartment building and took his keys and money.

On two occasions Roberts drove around the neighborhood with police officers in an unsuccessful effort to locate his assailants. On a third such occasion, three weeks after the robbery, Roberts pointed out McCray from a group of four individuals standing on a street corner, and the police arrested McCray for the robbery.

Jury selection for defendant's trial on these charges began on April 24, 1980.[2] During jury selection, the defendant moved for a mistrial, or in the alternative, for a hearing on his claim that the prosecutor was using peremptory challenges to exclude minority members from the jury on the basis of race. At that point the prosecutor had exercised seven of the fifteen allowable peremptory challenges against blacks, one against a Hispanic,

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[1] The accomplices were never apprehended.

[2] An earlier trial of the indictment had resulted in a mistrial when the jury was unable to reach a verdict.

and three or four against whites.[3] The record does not show how many blacks or Hispanics were accepted by the prosecutor only to be challenged by defense counsel, or how many were successfully challenged by either side for cause. While the voir dire was not recorded, the record shows that the prosecutor challenged a number of minority jurors because they had prior experience with the criminal justice system which the prosecutor perceived to be negative.[4] The prosecutor denied that any of her challenges were based on race.[5]

The court denied the motion for a mistrial and the motion for a hearing to examine the prosecutor's motives, finding that the prosecutor had not exercised peremptory challenges solely on the basis of race, that the defense had failed to make allegations sufficient to warrant a hearing, and that, in any event, neither federal nor state law requires an inquiry into the exercise of peremptory challenges in the absence of a showing of a pattern and practice of systematic discrimination in many cases. *People v. McCray*, 104 Misc.2d 782, 429 N.Y.S.2d 158 (Sup. Ct. Kings County 1980). The court relied for its legal analysis on this Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), which held that the equal protection clause does not prohibit the use of the peremp-

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[3] Each party was entitled to 15 peremptory challenges pursuant to N.Y. Crim. Proc. Law § 270.25(2)(b).

[4] At least four of the excluded minority jurors stated that they knew people who had been arrested or convicted of crimes, *People v. McCray*, 104 Misc.2d 782, 429 N.Y.S.2d 158 (Sup. Ct. Kings County 1980), 84 A.D.2d 769, 444 N.Y.S.2d 972 (2d Dept. 1981), 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982), *cert. denied*, 103 S. Ct. 2438 (1983), and a fifth had been the victim of a crime.

[5] This denial is reflected in the state trial court's opinion, and in the trial prosecutor's affidavit filed in federal district court. According to the prosecutor's affidavit, the prosecutor also offered to provide reasons for her challenges from her notes, but the state trial court refused to permit her to do so.

tory challenge to strike potential jurors on the basis of race in a particular case. Jury selection continued, resulting in the selection of twelve white jurors and two alternates, one of whom was black. The case proceeded to trial, and on April 28, 1980, the jury returned a verdict of guilty on both counts of robbery.

After the verdict, defendant renewed his claim of discrimination, and the trial court again rejected the claim. McCray was then sentenced, on February 19, 1981, to concurrent terms of imprisonment of two to six years and one and one-half to four and one-half years, respectively.

The Appellate Division of the New York Supreme Court, a court with factfinding power, N.Y. Crim. Proc. Law § 470.15(1), rejected without opinion McCray's claim that the prosecution had unlawfully used peremptory challenges to exclude prospective jurors on the basis of race. *People v. McCray*, 84 A.D.2d 769, 444 N.Y.S.2d 972 (2d Dept. 1981). Because that court had previously held that the New York Constitution prohibits the use of peremptory challenges to exclude jurors on the basis of race, *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dept. 1981), its affirmance of McCray's conviction may be interpreted as a factual determination that no such discrimination occurred in this case.*

The New York Court of Appeals rejected McCray's claim without reaching the factual question, because it held that neither the state nor the federal Constitution prohibits the use of the peremptory challenge to exclude jurors on the basis of race. *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982).

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* Alternatively, it may be interpreted as a determination that McCray's case was not governed by the rule announced in *Thompson*, which was decided after McCray's trial and before his sentence. *See People v. McCray*, 57 N.Y.2d at 552 n.1, 457 N.Y.S. 2d at 446 n.1 (1982) (Meyer, J., dissenting).

This Court denied certiorari, but five justices joined opinions indicating that the issue was not foreclosed by this Court's decision in *Swain*, and that the issue would eventually warrant Supreme Court review. The opinions encouraged the states and the lower federal courts to reconsider the question. *McCray v. New York*, 103 S. Ct. 2438 (1983). The New York Court of Appeals denied McCray's motion for reargument. 60 N.Y.2d 587, 467 N.Y.S.2d 1031 (1983).

Federal Court Proceedings

On October 3, 1983, McCray filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of New York, claiming that the prosecution had eliminated all potential jurors of black and hispanic origin, thereby violating his sixth amendment right to trial by impartial jury and his fourteenth amendment right to equal protection of the laws. McCray argued that the sixth amendment claim had not been addressed by *Swain*, and the equal protection claim was open to reconsideration in view of the opinions on the denial of certiorari. The state joined McCray in his legal argument that the sixth and fourteenth amendments to the Constitution prohibit the use of the peremptory challenge to exclude potential jurors on the basis of race,[7] but opposed the writ on the ground that the record did not support even a prima facie case of discrimination nor did any discrimination in fact occur in this case.

By Memorandum and Order dated December 19, 1983, the district court granted the petition. *McCray v. Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983). The court found that the state court record contained a prima facie showing of discrimination, in violation of both the equal

[7] The state also urged the court to hold that the ban applies to defense counsel as well as to the prosecutor, and to discrimination on the basis of sex, religion, and national origin as well as race.

protection clause and the sixth amendment to the United States Constitution, and therefore the state trial court should have required the prosecutor to offer nonracial reasons for the peremptory challenges, and should have determined whether in fact the challenges were based on race. The district court did not itself hold such a hearing, nor did it determine whether such a hearing would be feasible. Instead, it simply held that for lack of such a hearing in state court the writ should be granted. The district court denied the state's motion for reargument, and for an evidentiary hearing on the merits of McCray's claim.

The United States Court of Appeals for the Second Circuit vacated the judgment and remanded for an evidentiary hearing. The court felt constrained by this Court's decision in *Swain* to deny McCray's equal protection claim, but agreed that the sixth amendment prohibits the state from using the peremptory challenge to strike potential jurors on the basis of race, and affirmed the district court's determination that McCray had made a prima facie showing of unconstitutional jury selection in this case. The court of appeals held, however, that before granting the writ, the district court should have conducted a hearing to permit the state an opportunity to rebut the prima facie case. Moreover, the court held that, at such a hearing, the state must bear not merely the burden of going forward with evidence of racially neutral selection criteria, but rather the ultimate burden of proof on that issue.

On this petition for a writ of certiorari, the state contends that the court below correctly held that the sixth amendment prohibits the state from using peremptory challenges to strike potential jurors on the basis of race, and correctly held that a prima facie showing requires an evidentiary hearing rather than the immediate grant of the writ. The state contends, however, that these decisions, although correct, are worthy of this Court's review. Moreover, the court of appeals erred in several respects which are themselves worthy of review, because these

errors may be fatal to the sound and effective implementation of this important newly articulated constitutional rule:

1. The court, constrained by *Swain*, erroneously declined to hold that the ban on discrimination in jury selection derives not only from the sixth amendment but also from the equal protection clause;

2. The court erroneously limited the ban to prosecutors instead of applying it to defense counsel as well;

3. The court established an inadequate standard for finding a prima facie case of discrimination sufficient to require a hearing;

4. The court erroneously held that at the hearing required by a prima facie showing of discrimination, the state must bear not merely the burden of coming forward with explanatory evidence, but rather the ultimate burden of proof on the issue of discrimination.

Reasons for Granting the Writ

I. The Decision Below Creates a Conflict Among the Federal Courts of Appeals, and Between the State and Federal Courts in New York, as to whether the Federal Constitution Prohibits the Use of the Peremptory Challenge to Exclude Potential Jurors on the Basis of Race.

On May 31, 1983, five justices of this Court invited the lower state and federal courts to consider as an open question the claim that the sixth and fourteenth amendments ban the use of the peremptory challenge to strike potential jurors on the basis of race. In declining to review the judgment of the New York Court of Appeals

affirming Michael McCray's conviction, five members of this Court declared that the claim presented a serious constitutional question, notwithstanding the decision of this Court in *Swain v. Alabama*, 380 U.S. 202 (1965). Two justices would have granted certiorari, and the other three preferred to wait for a conflict in the lower federal courts and for further consideration of the matter in both state and federal courts.

Since the 1983 *McCray* opinions, the federal courts have been reexamining the question, either on the theory that *Swain's* continuing vitality was in doubt, or on the theory that *Swain* addressed only an equal protection claim and left open the question framed in sixth amendment terms. Since those opinions, five circuits have considered and rejected the sixth amendment claim. *See United States v. Whitfield*, 715 F.2d 145, 146-47 (4th Cir. 1983); *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984); *United States v. Childress*, 715 F.2d 1313 (8th Cir.) (en banc), *cert. denied*, 104 S. Ct. 744 (1984); *Weathersby v. Morris*, 708 F.2d 1493, 1497 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 719 (1984); *Willis v. Zant*, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3546 (1984). By contrast, the second circuit in this case criticized the equal protection holding of *Swain*, and held that the sixth amendment prohibits the use of the peremptory challenge to exclude potential jurors on the basis of race. Moreover, a trial court in the first circuit has ordered a hearing that points in the same direction. *Simpson v. Commonwealth*, No. 81-1193-S (D. Mass. July 20, 1984).[8]

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[8] In five circuits, the issue has not been addressed since the 1983 opinions on denial of certiorari in *McCray*. Three circuits reaffirmed *Swain* shortly before the *McCray* opinions. *United States v. Canel*, 708 F.2d 894, 898 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 165 (1984); *United States v. Durham*, 587 F.2d 799, 801 (5th Cir. 1979); *United States v. Jenkins*, 701 F.2d 850, 859-60 (10th Cir. 1983). In the sixth circuit and the District of Columbia circuit the courts appear not to have addressed the issue.

The division in the circuits alone justifies the grant of certiorari to review the judgment in this case. Moreover, the conflict between the Second Circuit Court of Appeals and the New York Court of Appeals creates an additional reason for granting the writ. The New York state courts have repeatedly held that in the event of such a conflict they follow the state rather than the federal court of appeals. *People v. Payton*, 45 N.Y.2d 300, 312 (1978), *rev'd on other grounds*, 445 U.S. 573 (1980); *New York Rapid Transit Corp. v. City of New York*, 275 N.Y. 258, 265 (1937), *aff'd*, 303 U.S. 573 (1938); *People v. Rodriguez*, 65 A.D.2d 608, 409 N.Y.S.2d 707 (2d Dept. 1978); *People v. Malloy*, 21 A.D.2d 904, 251 N.Y.S.2d 752 (2d Dept. 1964), *rev'd on other grounds*, 22 N.Y.2d 559, 240 N.E.2d 37, 293 N.Y.S.2d 542 (1968). Therefore, unless this Court resolves the conflict, the state courts will decline to hold hearings on the claim of discriminatory use of the peremptory challenge. As a result, constitutional error will be planted in state trials that will ultimately require these convictions to be vacated years later on federal habeas corpus review, and federal courts will be compelled to hold hearings that should have been held in state court.

This Court should grant the writ of certiorari to review the judgment below and resolve both of these conflicts.

II. The Decision Below Presents A Significant and Recurring Question of Law Concerning Race Discrimination in the Jury Selection Process.

This case presents the pressing question whether the Constitution permits the use of the peremptory challenge to exclude potential jurors in an individual case on the basis of race. Twenty years ago this Court held that the equal protection clause did not prohibit the race-based use of the peremptory challenge in an individual case, *Swain v.*

Alabama, 380 U.S. 202 (1965), but the reasons for that decision have been undermined by experience and this Court should reconsider that ruling. Morover, this Court has never considered the question whether the sixth amendment prohibits the race-based use of the peremptory challenge, and that question alone is worthy of this Court's review. That question, of course, was not presented in *Swain*, which was decided before the sixth amendment was made applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

Three important developments of the past twenty years demand the reconsideration of *Swain*. First, the experience of the lower state and federal courts under the *Swain* rule makes it clear that the burden of meeting the *Swain* test is nearly insurmountable. *See* authorities collected in *McCray v. New York*, 103 S. Ct. at 2441 n.4 (Marshall, J., dissenting from denial of certiorari). Second, several state courts have found in their state constitutions a ban on discrimination in the use of the peremptory challenge, and the experience of those states shows that enforcement of that ban by judicial inquiry into the reasons for peremptory challenges does not impose a substantial burden on the orderly administration of justice. *See, e.g., People v. Hall*, 35 Cal.3d 161, 672 P.2d 854, 197 Cal. Rptr. 71 (1983). Moreover, it was the law of New York's second department for almost two years, as a result of *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dept. 1981), *overruled, People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982), *cert. denied*, 103 S. Ct. 2438 (1983), and during that period it did not create any practical problems at all. Third, the application of the sixth amendment to the states by *Duncan* has opened the state jury selection process to judicial scrutiny under the sixth amendment, rendering moot any concern that by recognizing an equal protection claim the Court might unduly invade the state jury selection process.

These developments cast serious doubt on the continuing vitality of *Swain*, and remove the pragmatic obstacles that may previously have inhibited this Court from holding that the Constitution bans the use of the peremptory challenge to exclude potential jurors solely on the basis of race.

III. The Decision Below Raises Important Questions Concerning the Proper Scope and Implementation of the Constitutional Rule Banning the Use of the Peremptory Challenge to Exclude Potential Jurors on the Basis of Race or Membership in Other Cognizable Groups.

The principal objection to a constitutional ban on discriminatory use of the peremptory challenge has always been a pragmatic concern for the "procedural and substantive problems associated with judicial review of peremptory challenges," *McCray v. New York*, 103 S. Ct. at 2439 (opinion of Stevens, J., respecting denial of certiorari). *See, e.g., Swain v. Alabama*, 380 U.S. 202, 221-22 (1965); *People v. Davis*, 95 Ill.2d 1, 447 N.E.2d 353 (1983); *People v. McCray*, 57 N.Y.2d 542, 547-49, 457 N.Y.S.2d 441, 443-45 (1982), *cert. denied*, 103 S. Ct. 2438 (1983); Saltzburg and Powers, *Peremptory Challenges and the Clash Bewteen Impartiality and Group Representation*, 41 Md. L. Rev. 337 (1982); Younger, *Unlawful Peremptory Challenges*, 21 Judges' J. 27, 55-56 (Winter 1982).

The court below admirably refused to be deterred from announcing a sound constitutional principle by the specter of practical problems. The court, however, failed to anticipate and resolve some of those problems, creating the danger that a sound general principle will be unnecessarily costly and burdensome to administer.

A. First, the court declined to extend the principle to defense counsel, notwithstanding powerful legal and practical arguments in favor of doing so. The practice of

striking jurors on the basis of race is equally pervasive, equally damaging, and equally vulnerable to constitutional attack, whether followed by prosecutors or by defense counsel. As the California, Massachusetts, and Florida courts have recognized, the prohibition must apply to defense counsel as well as to prosecutors, in order to guarantee that potential jurors will not be excluded on the basis of race, and to preserve the appearance of fairness in the criminal jury trial system. *Wheeler*, 22 Cal.3d at 283 n.29, 583 P.2d at 765 n.29, 148 Cal. Rptr. at 907 n. 29; *Soares*, 377 Mass. at 490 n.35, 387 N.E.2d at 517 n.35; *State v. Neil*, Nos. 63,899, 63,933, slip op. at 9-10 (Fla. Sup. Ct. Sept. 27, 1984).

The practice of striking jurors on the basis of race is widespread among defense counsel as well as prosecutors. *See, e.g., Commonwealth v. Little*, 1981 Mass. Adv. Sh. 1818; *Commonwealth v. Perry*, 15 Mass. App. Dec. 932, 444 N.E.2d 1298 (1983); *Commonwealth v. DiMatteo*, 1981 Mass. App. Ct. Adv. Sh. 1777. Moreover, prosecutors charged with engaging in the practice frequently respond by pointing to similar behavior by defense counsel. *See, e.g., People v. Fuller*, 136 Cal. App. 36 at 417, 186 Cal. Rptr. at 291; *Commonwealth v. Soares*, 377 Mass. at 489 n.35, 389 N.E.2d at 517 n.35; *Commonwealth v. Brown*, 1981 Mass. App. Ct. Adv. Sh. 238. Of course, discrimination by defense counsel does not justify discrimination by the prosecutor. It does, however, demonstrate the need for a rule that prohibits discrimination by both parties. For a one-sided rule would unbalance the jury selection process and prevent the selection of juries drawn from a fair cross-section of the community.

When defense counsel exclude jurors on the basis of race, just as when prosecutors do it, the result is to harm both the excluded jurors and the public. The jurors are denied, by reason of race, the opportunity to participate in a fundamental governmental process, and are thereby

stigmatized in their own eyes and those of any observers of the trial, which is, of course, a public event. *See Carter v. Jury Commission*, 396 U.S. 320 (1970); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). Moreover, the community, and especially the victim, may lose confidence in the outcome of the judicial process if they see that jurors are excluded on the basis of race. *See Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *Singer v. United States*, 380 U.S. 24 (1965) (state interest in jury trial); *Ballard v. United States*, 329 U.S. 187, 195 (1946).

A state cannot avoid its obligation to maintain a nondiscriminatory jury selection system by delegating part of the selection process to private actors. *Nixon v. Herndon*, 273 U.S. 536 (1927) (White Primary Cases). A state's jury selection system is the mechanism by which citizens are selected to participate in the administration of the laws. In selecting a jury, defense counsel is performing a governmental function, and therefore counsel is bound by the constitutional constraints by which all state actors must abide. Moreover, defense counsel's challenges have no effect until they are enforced by the court, and the Constitution prohibits the courts from enforcing a defendant's exclusion of jurors solely on the basis of race. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

The second circuit may have avoided the issue of defense challenges because it felt constrained by *Swain* to reject the equal protection claim and rest its decision entirely on the sixth amendment. The sixth amendment right to jury trial is primarily a right of the defendant, although this Court has recognized that the state, representing the community, also has an important interest in the right to a jury trial, *Singer v. United States*, 380 U.S. 24 (1965), and that state interest may also be entitled to constitutional protection.

The equal protection clause, by contrast, clearly confers rights on potential jurors and the community at large

to be free of unconstitutional discrimination. *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970), quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). This Court should reconsider the equal protection holding of *Swain*, and convert the one-sided rule of the second circuit into an evenhanded and workable rule.

B. Second, by finding a prima facie case of discrimination on this record, the court established an inadequate standard for determining whether a hearing is required on a claim of discriminatory use of peremptory challenges. The court of appeals found a prima facie showing of discrimination from the mere selection of an all-white jury together with the fact that one of the seven challenged minority jurors seemed to the federal appeals court to be a juror favorably disposed to the prosecution.[9] The court failed to give adequate weight to the extensive and informative questioning of the struck jurors, which had elicited ample nonracial reasons for the challenges. The court also unjustifiably attributed to the prosecutor all the challenges of minority jurors, despite the failure of the record to show how many minority jurors were acceptable to the prosecution only to be challenged by the defense. The holding of the court of appeals will call for hearings far more often than necessary, and far more often than is required by the law of Massachusetts or California, where this rule has been in effect for years.

Defenders of *Swain* have predicted that its abandonment will lead to numerous and interminable hearings, thereby exacerbating court congestion and delay. That fear provides no reason for a court to permit race discrimination in jury selection, but it does provide a reason to require a genuine prima facie showing before requiring a hearing.

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[9] The court acknowledged that four of the excluded minority jurors had stated they knew people who previously had been arrested or convicted of crimes.

C. Third, by holding that after a prima facie case is shown the prosecution must not merely come forward with evidence but rather carry the ultimate burden of proving nondiscrimination, the court has imposed a rule that will be unduly onerous, especially in cases like this one, where the issue is being litigated on a petition for federal habeas corpus, years after the trial in question.

The second circuit stated its burden of proof requirement by quoting from *Castaneda v. Partida*, 430 U.S. 482, 494 (1977), which in turn quotes from *Washington v. Davis*, 426 U.S. 229, 241 (1976), quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972):

> If the defendant establishes such a prima facie case, "'"the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."'"

McCray, slip op. at 7007-08. Taken literally, that passage shifts to the state the ultimate burden of persuasion on the issue of discrimination.

This Court has stated in the Title VII context that a prima facie showing of intentional discrimination merely shifts the burden of coming forward with evidence, and not the ultimate burden of persuasion. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The thoughtful analysis of *Burdine* ought to apply equally to a claim of unconstitutional discrimination in the use of the peremptory challenge. The effect of the prima facie showing is to authorize an inquiry into the reasons behind the peremptory challenges exercised in a particular case, an inquiry that would ordinarily be barred by statute. The failure to give reasons leads to a finding of discrimination based on the prima facie showing. If legitimate nondiscriminatory reasons are given, however, then the presumption of discrimination disappears, the inquiry proceeds to the next level, and the party claiming

discrimination must bear the ultimate burden of persuasion.

In this case, as in *Burdine*, the claim is that an individual had intentionally excluded candidates for impermissible discriminatory reasons. While objective evidence may be sufficient to establish a prima facie case of intentional discrimination, ultimately the court must determine an individual's subjective intent. *Burdine* recognized that a person may be required to respond to a prima facie showing of discrimination, but that the response should be judged under rules that leave the ultimate burden of proof on the challenger. This Court should provide the same guidance for the courts that will conduct hearings on charges of discrimination in the use of the peremptory challenge in jury selection as it has provided for the trial of employment discrimination cases.

It is conceivable that the second circuit opinion intended to invoke the *Burdine* analysis of burdens of proof, but there is nothing in the language of the opinion to suggest that result. The district court in this case would be justified in reading the opinion literally, and imposing the ultimate burden of proof on the state at the hearing that has been ordered by the court of appeals. This Court should correct or clarify that ruling before a hearing is conducted, in order to provide guidance to the district court, and to prevent that court from conducting a hearing under an erroneous understanding of the applicable law.

In many cases, especially where the challenge and the hearing are contemporaneous, the burden of proof should have little significance, because either the explanations for the challenges will be plausible or they will not. But inevitably some cases will be close, and that is particularly likely in a case like this one, where a federal court must review a jury selection that happened years ago. If the court is genuniely in doubt on the question of discrimination, the ultimate burden of proof will be dispositive. It

should fall on the defendant who asks a federal court to overturn a state conviction.

A prompt and reasonable resolution of the burden of proof question may well spell the difference between a successful and manageable ban on discrimination in jury selection, and one that causes great disruption and delay. This Court should grant certiorari in order to resolve the several critical questions about the scope of the rule and the procedures for its implementation and thereby to ensure the sound implementation of this new constitutional rule.

CONCLUSION

In recent years this Court has consistently denounced intentional discrimination. This case presents the question whether the courts should permit and participate in intentional discrimination within the judicial system itself. This Court should grant the writ of certiorari to overturn *Swain* and to rid the judicial system of the last vestige of intentional discrimination.

For the foregoing reasons, this Court should grant the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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March 4, 1985

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1272—August Term, 1983

(Argued: May 22, 1984 Decided: December 4, 1984)

Docket No. 84-2026

MICHAEL MCCRAY,

Petitioner-Appellee,

— v. —

ROBERT ABRAMS,

Respondent-Appellant.

Before:

LUMBARD, MESKILL, *and* KEARSE, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Eugene H. Nickerson, *Judge, see* 576 F. Supp. 1244 (1983), conditionally granting petition for habeas corpus based on prosecutor's exclusion of blacks and Hispanics from jury.

Affirmed in part, vacated in part, and remanded.

Judge Meskill dissents in a separate opinion.

STEVEN R. SHAPIRO, New York, New York (New York Civil Liberties Union, New York, New York), *for Petitioner-Appellee.*

BARBARA D. UNDERWOOD, Assistant District Attorney, Brooklyn, New York (Elizabeth Holtzman, District Attorney, Kings County, Allan P. Root, Assistant District Attorney, Brooklyn, New York, on the brief), *for Respondent-Appellant.*

KEARSE, *Circuit Judge:*

Respondent New York State Attorney General Robert Abrams (the "State") appeals from a judgment of the United States District Court for the Eastern District of New York, Eugene H. Nickerson, *Judge*, granting the petition of Michael McCray, a black defendant convicted in New York State Supreme Court of robbery, for a writ of habeas corpus on the ground that the prosecution's use of peremptory challenges to excuse all black and Hispanic venirepersons from the jury that convicted McCray violated the impartial jury trial and equal protection provisions, respectively, of the Sixth and Fourteenth Amendments to the Constitution. *McCray* v. *Abrams*, 576 F. Supp. 1244 (E.D.N.Y. 1983). The district court ordered the State to release McCray unless it afforded him a new trial within 60 days.[1] The court stayed its judgment pending this appeal.

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[1] Although McCray has not been incarcerated since his conviction, but rather has been allowed, upon posting a bond, to remain at liberty pending the conclusion of the proceedings challenging his conviction, he is, by virtue of the limitations placed upon his freedom, in "custody" within the meaning of the federal habeas corpus statute, 28 U.S.C. § 2254(a) (1982). *See Hensley* v. *Municipal Court*, 411 U.S. 345 (1973); *Jones* v. *Cunningham*, 371 U.S. 236, 240 (1963).

On appeal, the State agrees that a discriminatory use of peremptory challenges would violate a defendant's fundamental rights. It contends, however, that the district court (1) erred in ruling that McCray made out a prima facie case that the prosecution so used its peremptory challenges in his case, and (2) if a prima facie case was established, erred in not holding an evidentiary hearing giving the State an opportunity to rebut the inference that it had exercised its peremptory challenges for a constitutionally forbidden purpose.

We hold that the district court properly concluded that McCray established a prima facie case that the State's use of peremptory challenges violated his Sixth Amendment right to trial by an impartial jury, and we affirm that portion of the court's ruling. We are persuaded, however, that the court should have held a hearing to give the State an opportuntiy to rebut the prima facie case, and we therefore vacate the judgment and remand for further proceedings.

I. Background

On November 15, 1978, Philip Roberts, a white art student, was assaulted and robbed at gunpoint in downtown Brooklyn by three black youths. Roberts returned to his college dormitory and notified his resident adviser and the police. The police did not respond immediately, but on December 1 and 5, they took Roberts on a tour of the area. The first expedition did not produce an identification, but during the second, Roberts identified McCray, who was standing on a street corner near his home, as one of the robbers.

McCray was arrested and charged with robbery in the first and second degrees. The arrest was McCray's first.

A. *The State Court Proceedings*

McCray's first trial was before a jury composed of nine whites and three blacks. The trial ended in a hung jury, with nine jurors voting to convict and three voting to acquit. It appears that either two or three of the jurors who voted to acquit were black (*see* Part I.C. *infra*).

McCray was retried, with the same Assistant District Attorney ("ADA") as prosecutor. Under N.Y. Crim. Proc. Law § 270.25(2)(b) (McKinney 1982), each side was entitled to fifteen peremptory challenges. After the exercise of eleven or twelve challenges by the State, McCray moved for a mistrial on the ground that the prosecutor appeared to be systematically using the State's peremptory challenges to exclude blacks and Hispanics from the jury. In support of this contention, McCray pointed out that "[t]here have been seven black people and one Hispanic ven[ire] man up to this point. [The prosecutor] has challenged each and every one of them. Of her eleven challenges, she has used eight to challenge blacks and Hispanics." (Transcript of hearing dated April 24, 1980, at 5.) McCray requested a hearing at which the prosecutor would be asked to testify as to why she excluded the venirepersons she did. Following argument by McCray's counsel, the court denied the request for a hearing and the motion for a mistrial. The record does not reflect that the prosecutor made any statement with regard to her use of challenges.

In a later opinion explicating its denial of the motion, *People* v. *McCray*, 104 Misc. 2d 782, 429 N.Y.S.2d 158 (Sup. Ct. Kings County 1980), the court stated that the prosecutor had denied excusing jurors on the ground of race. *Id.* at 783, 429 N.Y.S.2d at 159. The court

stated that it had denied the motion for a mistrial because of the presumption that peremptory challenges are properly exercised and the administrative burden that would be entailed in reviewing their exercise. The court further reasoned that excusing a juror of the same race as the defendant on the ground of perceived group affinity is "a time honored basis for the exercise of peremptory challenges." *Id.* at 784, 429 N.Y.S.2d at 159.

The case against McCray proceeded to trial before an all-white jury (*see* Part I.D. *infra*). The only evidence against him was the identification made by Roberts. The jury found McCray guilty, as charged, of first and second degree robbery. McCray was sentenced to concurrent prison terms of 2 to 6 years on the first degree robbery charge and 1½ to 4½ years on the second degree robbery charge.

Prior to sentencing, McCray moved for a new trial, again attacking the State's use of its peremptory challenges. The court denied the motion. McCray pursued his contention on appeal without success. The Appellate Division affirmed without opinion, 84 A.D.2d 769, 444 N.Y.S.2d 972 (2d Dep't 1981). The New York Court of Appeals affirmed in a 4-3 decision, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982). The Court of Appeals majority, relying on *Swain v. Alabama*, 380 U.S. 202 (1965), concluded that neither federal nor state constitutional rights were implicated in the prosecutor's striking of all minority venirepersons, stating that "[t]he benefits of requiring the prosecutor to justify the exercise of certain peremptory challenges are simply outweighed by the damage to a system of jury selection which best serves to guarantee a fair and impartial jury." 57 N.Y.2d at 549, 457 N.Y.S.2d at 445. The three dissenters viewed *Swain* as

not controlling in light of the Sixth Amendment's guarantee of an impartial jury from which no large, identifiable segment of the community has been systematically excluded. *Id.* at 552-53, 457 N.Y.S.2d at 447 (Meyer, *J.*, dissenting); *id.* at 556-57, 457 N.Y.S.2d at 449 (Fuchsberg, *J.*, dissenting).

B. *The Denial of Certiorari*

McCray then sought a writ of certiorari from the United States Supreme Court. The Court denied the petition, 103 S. Ct. 2438 (1983), but five Justices indicated their view that a discriminatory exercise of prosecutorial peremptories should not be considered beyond judicial scrutiny. Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari, on the ground that "*Swain* was decided before this Court held that the Sixth Amendment applies to the states through the Fourteenth Amendment . . . and . . . should be reconsidered in light of Sixth Amendment principles established by our recent cases." *Id.* at 2441 (opinion of Marshall, *J.*, dissenting). Three Justices, in an opinion by Justice Stevens, joined by Justices Blackmun and Powell, stated that they did not disagree with Justice Marshall's assessment of the importance of the issue. Rather, they voted to deny certiorari on the ground that "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." *Id.* at 2438 (opinion of Stevens, *J.*).

McCray moved in the New York Court of Appeals for reargument in light of the opinions accompanying the Supreme Court's denial of certiorari. The motion was denied without opinion, 60 N.Y.2d 587, 467 N.Y.S.2d 1031 (1983).

C. *The Present Habeas Petition*

Having exhausted his state remedies, McCray filed the present petition for habeas corpus in the district court pursuant to 28 U.S.C. § 2254 (1976), alleging that "[t]he prosecution's use of peremptory challenges to exclude all minority members (7 blacks, 1 hispanic) drawn for the jury panel on the basis of race violates the Sixth Amendment right to trial by an impartial jury and the Equal Protection Clause of the Fourteenth Amendment." (Petition for Writ of Habeas Corpus, filed October 3, 1983, ¶ 11.) In support of the petition, the attorney who had represented McCray at his second trial submitted an affidavit stating, *inter alia*, that it was his recollection that the three jurors who had voted to acquit McCray at his first trial had been the three black jurors; that during jury selection at the second trial, conducted by the same ADA who conducted the first trial, he "noticed that [the prosecutor] was pre-emptorily [*sic*] challenging every single black and hispanic potential juror"; that the prosecutor peremptorily challenged seven blacks and one Hispanic, at least three of whom had not stated that they knew anyone who had committed a crime or knew anyone accused or suspected of committing a crime; and that one of the blacks peremptorily challenged stated that he had either a relative or a close friend who was a victim of a crime and who had been shot during the course of a robbery.

In opposition to the petition, the State agreed that the Constitution should be construed to prohibit the prosecutor from using peremptory challenges to exclude potential jurors solely on the basis of race, and urged the court to prohibit such use by defendant as well. The State argued that in the present case McCray had not

made a prima facie showing that the prosecutor used peremptory challenges to exclude jurors solely on the basis of race. It asserted that the prosecutor had not used peremptory challenges to exclude every minority member drawn for the jury panel, it being the recollection of both trial counsel that one black juror had been selected to serve as an alternate. It stated that defense counsel had conceded that at least some of the minority jurors challenged by the prosecutor had made statements during the voir dire that would lead the prosecutor to seek to excuse them. The State conceded that the prosecutor had exercised seven peremptory challenges against blacks and one against a Hispanic, and stated that she had used either three or four against white venirepersons. Relying on the trial court's opinion, 104 Misc. 2d at 783, 429 N.Y.S.2d at 159, the State asserted that when the prosecutor's use of peremptory challenges was questioned during the jury selection process, the prosecutor had denied excusing jurors on the basis of race. The State did not, prior to the district court's announcement of its decision on McCray's petition, submit an affidavit from the ADA who had conducted McCray's trials.

On December 19, 1983, in an opinion reported at 576 F. Supp. 1244, Judge Nickerson ruled in favor of McCray. The court ruled that judicial scrutiny of discriminatory prosecutorial peremptory challenges was required by the Sixth Amendment. *Id.* at 1248. Further, relying on the opinions accompanying the Supreme Court's denial of McCray's petition for certiorari, the court concluded that *Swain* v. *Alabama* is no longer good law, and that "[t]he equal protection clause should be construed to prohibit a prosecutor's exercise of peremptory challenges to exclude blacks solely on the basis of race in any case." *Id.* at 1249.

According considerable weight to state court developments in California and Massachusetts, *see Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), Judge Nickerson set out the procedure to be followed when the defense alleges that the prosecution is abusing its peremptory challenges. If the prosecution's peremptories have been used in such a way as to establish a prima facie case of racial discrimination, the presumption of proper use of the peremptory gives way and the burden shifts to the prosecution to justify its challenges on nonracial grounds. Citing *Wheeler*, the court held that a prima facie case of improper challenges may be established when the venirepersons excluded are members of a "'cognizable group' discrimination against which is prohibited," and the probable reason for their exclusion is their membership in the group rather than any predisposition regarding the specific case at bar. 576 F. Supp. at 1249. Once this showing is made, the prosecution may rebut the prima facie case by demonstrating that its peremptory challenges were motivated by perceived case-specific biases, rather than by group association. Its explanations need not rise to a level that would warrant a challenge for cause. Concluding that the trial court had erred by failing to inquire into the bases for the prosecution's use of peremptory challenges against black and Hispanic venirepersons, the district court ruled that a new trial was constitutionally required.

After the district court rendered its decision, the State moved to "amend the judgment and to expand the record," contending that the court had overlooked vital criteria for determining whether McCray had established a prima facie case, and that the State was entitled to a

hearing on the merits of McCray's contention. In support of this motion, the State submitted an affidavit from the former ADA who had conducted McCray's trials, describing her use of peremptory challenges and the proceedings on McCray's motion for a mistrial during the jury selection process. The affidavit stated that the prosecutor had not discriminated on the basis of race in selecting jurors for the trials of McCray; that she had challenged a number of jurors as a result of their or their family's negative experiences with the criminal justice system because she believed those jurors were biased against the prosecution; that she had unsuccessfully sought to have those jurors excused for cause before excusing them peremptorily; and that the first alternate juror was black and that she did not excuse him although she still had peremptory challenges available. The prosecutor stated that the trial judge had convened a hearing on McCray's motion for a mistrial; that the court asked her whether she had discriminated on the basis of race in selecting the jury and that she had answered in the negative; that she asked for permission to explain, relying on notes she had kept, the reasons for her peremptory challenges; and that the judge refused her permission to explain, stating that he was satisfied that she had not discriminated on the basis of race in making her challenges. The prosecutor stated that after McCray's first trial, she had interviewed those jurors at some length and that to the best of her recollection, of the three jurors who voted for acquittal two were black and one was white, and that, according to the jurors interviewed, the white juror who voted for acquittal was the "motivating force" behind the remaining two votes for acquittal.

Judge Nickerson treated the State's motion to amend judgment and expand the record as a motion for reargu-

ment of the petition and denied it without comment. This appeal followed.

D. *The Issues on This Appeal*

On this appeal, the State makes a relatively narrow challenge to the district court's decision. Its position is that the court correctly held that the Sixth and Fourteenth Amendments bar the use of peremptory challenges to strike potential jurors on the basis of race. Further it states that the recollections of both trial counsel agree that the jury that convicted McCray consisted of twelve white jurors. The State argues only that McCray failed to establish a prima facie case of the State's racially discriminatory use of its peremptories, and that even if he did make the necessary prima facie showing, the court should not have granted the writ without holding a hearing to allow the State to present rebutting evidence.

Notwithstanding the State's doctrinal concessions, we must begin with a review of the court's ruling that the Sixth and Fourteenth Amendments bar the prosecutor's discriminatory use of peremptory challenges, for the constitutional doctrine informs the analysis of both whether a prima facie case has been established and what proceedings should follow the establishment of such a case. Our review persuades us that the court correctly ruled that the Sixth Amendment prohibits the prosecution's use of challenges to discriminate on the basis of race and that McCray presented sufficient evidence to establish a prima facie case of such use. We agree with the State, however, that the State should have been accorded an opportunity to rebut that showing.

II. Equal Protection and *Swain* v. *Alabama*.

We begin with a review of *Swain* v. *Alabama*, 380 U.S. 202, which is the only United States Supreme Court decision thus far to address directly the constitutional validity of the use of peremptory jury challenges to discriminate on the basis of race. Although much criticized, *Swain* has led most courts to reject all constitutional challenges to the prosecutor's alleged discriminatory use of peremptories.

A. *Swain* v. *Alabama*

Swain was a black defendant convicted by an all-white jury of the rape of a white woman. In his case, the trial jury venire had included eight blacks, two of whom were exempt; the prosecution used its peremptory challenges to remove the other six. Swain also showed that in the county in which he was tried, there had not since 1950 "been a Negro on a petit jury in either a civil or criminal case . . . and that in criminal cases prosecutors ha[d] consistently and systematically exercised their strikes to prevent any and all Negroes on petit jury venires from serving on the petit jury itself." 380 U.S. at 223; *see also id.* at 231-32 (Goldberg, *J.*, dissenting: "[P]etitioner established by competent evidence . . . that no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama."). Invoking a long line of cases beginning with *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), that had held that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause," *Swain* v. *Alabama*, 380 U.S. at 203-04 (citing *Ex parte*

Virginia, 100 U.S. 339 (1880); *Gibson* v. *Mississippi*, 162 U.S. 565 (1896)), Swain contended, *inter alia*, that the prosecution's use of its peremptory challenges constituted invidious discrimination in the selection of jurors, in violation of his rights under the Equal Protection Clause. The Supreme Court disagreed.

In Part II of its opinion, the Court discussed at some length the history and purposes of the peremptory challenge. Tracing such challenges back past The Ordinance for Inquests, 33 Edw. 1, Stat. 4 (1305), the Court noted the persistent use of peremptories in American trials and the prevailing view that they are a necessary part of a trial by jury, for they allow the challenge of a person thought to be less than fair and impartial but for whom cause to strike cannot be shown, and permit the removal of a person who may have been offended by a probing voir dire. The Court stated that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control," 380 U.S. at 220, and that "'it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose,'" *id.* at 219 (quoting *Lewis* v. *United States*, 146 U.S. 370, 378 (1892)).

Given the nature and the history of the peremptory challenge, the Court found merit in the proposition that the system, "in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes." 380 U.S. at 212. The Court concluded that "we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.* at 221.

> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, *we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case.* The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. *The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.* Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

Id. at 222 (emphasis added).

The Court went on to say, in Part III of its opinion, that a defendant could require judicial inquiry into the prosecutor's use of peremptory challenges if he could show that

> the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries. . . . If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on

> trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

Id. at 223-24. The Court found, however, that Swain had not met this standard of proof.

B. *Mission Impossible*

Not surprisingly, almost no other defendants in the nearly two decades since the *Swain* decision have met this standard of proof either. For example, in *United States* v. *Carter*, 528 F.2d 844 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976), the defendant showed that "[d]uring the year 1974 in the 15 cited cases involving black defendants a total of 70 Negroes were potentially available as trial jurors and 57 of those were stricken by the government through the use of its peremptory challenges." *Id.* at 848. At Carter's first trial two of four blacks were peremptorily challenged by the government; at his second trial, all five blacks were so challenged. His equal protection argument was rejected. In *United States* v. *Danzey*, 476 F. Supp. 1065 (E.D.N.Y. 1979), *aff'd mem.*, 620 F.2d 286 (2d Cir.), *cert. denied*, 449 U.S. 878 (1980), four blacks were peremptorily challenged by government, and one black was seated on the jury only after the prosecutor had exhausted his challenges. The prosecutor explained to the trial judge: "I make it a practice to attempt to exclude as best I can all jurors so that to [*sic*] exclude jurors of the same ethnic background as the defendant." *Id.* at 1066. Danzey's equal protection argument was rejected.[2] Not until *State* v. *Brown*, 371 So. 2d 751 (La.

[2] Equal protection challenges were likewise rejected in, *e.g.*, *United States* v. *Pearson*, 448 F.2d 1207, 1213-17 (5th Cir. 1971)

[Footnote continued on following page]

1979), and *State* v. *Washington*, 375 So. 2d 1162 (La. 1979), involving a prosecutor who admitted the practice of striking blacks and whose use of peremptory challenges had been repeatedly appealed by black defendants, did any court find the *Swain* burden satisfied.

As Justice Marshall noted in his dissent to the denial of McCray's petition for certiorari, "[i]n the nearly two decades since it was decided, *Swain* has been the subject of almost universal and often scathing criticism." *McCray* v. *New York*, 103 S. Ct. 2438, 2440 (opinion of Marshall, *J.*, dissenting; footnote, citing numerous writings, omitted). *See, e.g.*, Comment, Swain v. Alabama: *A Constitutional Blueprint for the Perpetuation of the All-White*

[Footnote continued from previous page]

(In trials held during a certain week, the government peremptorily challenged 10 out of 12 blacks in cases where the defendant was black, but only three out of 12 blacks where the defendant was white.); *State* v. *Davis*, 529 S.W.2d 10 (Mo. Ct. App. 1975) (The prosecution peremptorily challenged seventy-five percent of black venirepersons in thirty-one criminal cases involving black defendants.); *see also United States* v. *Newman*, 549 F.2d 240 (2d Cir. 1977) (rejecting statistical evidence as not probative of extent to which blacks were peremptorily excused within division in which trial was held); *United States* v. *Boyd*, 610 F.2d 521, 526 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980); *United States* v. *Durham*, 587 F.2d 799, 801 (5th Cir. 1979); *United States* v. *McLaurin*, 557 F.2d 1064, 1076 (5th Cir. 1977) (of six blacks in original venire, one excused for cause, other five excused peremptorily by government), *cert. denied*, 434 U.S. 1020 (1978); *United States* v. *Nelson*, 529 F.2d 40, 42-43 (8th Cir.) (all three blacks peremptorily challenged by government), *cert. denied*, 426 U.S. 922 (1976); *United States* v. *Pollard*, 483 F.2d 929, 930 (8th Cir. 1973) (all four blacks peremptorily challenged by government), *cert. denied*, 414 U.S. 1137 (1974); *Greene* v. *United States*, 486 F. Supp. 199, 200 (W.D. Mo.) (all five blacks peremptorily challenged by government), *aff'd*, 626 F.2d 75 (8th Cir.) (per curiam), *cert. denied*, 449 U.S. 876 (1980); *Rogers* v. *State*, 257 Ark. 144, 515 S.W.2d 79 (1974) (all six blacks peremptorily challenged by state), *cert. denied*, 421 U.S. 930 (1975). *See generally* Annot., 79 A.L.R.3d 14 (1977) (*Swain* standard not found satisfied in any case from any jurisdiction); J. Van Dyke, *Jury Selection Procedures* 154-60 & nn. 73-98 (1977).

Jury, 52 Va. L. Rev. 1157 (1966); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 Yale L.J. 1715, 1723 & n.36 (1977); Winick, *Prosecutorial Peremptory Challenge Practice in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 10-11 (1982). Many of these commentaries have been critical, in our view rightly, of the nearly impossible task set for the defendant in Part III of the *Swain* opinion, *i.e.*, to show that in all cases, in all circumstances, whoever the victim, whoever the defendant, blacks were excluded from juries without cause.

We disagree as well with some of the fundamental premises found in Part II of *Swain*. For example, the Court's statement that there was no violation of equal protection because blacks and whites "are alike subject to being challenged without cause," 380 U.S. at 221, ignores practice. In most communities a majority of those eligible for jury duty are white; and as a practical matter, the prosecution does not peremptorily excuse whites simply because they are whites. Thus, although the implication in Part III of *Swain*, is that "the Negro [should have] the same right and opportunity to participate in the administration of justice enjoyed by the white population," *id.* at 224, we think the assumption of Part II that that right is not violated simply because both blacks and whites are "subject to" being peremptorily excluded is fanciful.

More importantly, *Swain's* basic premise furthers the erosion of that right. The *Swain* Court found it permissible for a prosecutor to eliminate all blacks in any given case simply because they are blacks, because the "presumption . . . must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury . . . ." *Id.* at 222. The implication of this presumption, however,

is that in any given case before the court, whites can be fair and impartial, whereas blacks, simply because they are blacks, cannot. The application of this premise as *Swain* suggests to "any given" case—as for example, where a black defendant is accused of a homicidal attack on a white person, *e.g.*, *Ristaino* v. *Ross*, 424 U.S. 589 (1976), or where there may be less of a racial undercurrent, as where a black defendant is accused of receiving stolen property, *e.g.*, *People* v. *Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (2d Dep't 1981), *appeal withdrawn*, 55 N.Y.2d 879 (1982), or even where a white defendant is charged with an offense against a white victim, *e.g.*, *Peters* v. *Kiff*, 407 U.S. 493 (1972)—results in the conclusion that in each case only white jurors will be sufficiently fair and impartial to adjudicate the controversy. Yet, it is fallacious to assume that all persons sharing an attribute of skin color, or of gender or ethnic origin, *etc.*, will *ipso facto* be partial to others sharing that attribute. Thus, in jury selection contexts other than those involving peremptory challenges, the Court has rejected the notion that a particular racial or ethnic group will make determinations solely on the basis of their group affiliation. In *Ristaino* v. *Ross*, for example, the Court ruled that "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes" did not give the defendant a constitutional right even to cause a voir dire question relating specifically to racial prejudice to be asked in addition to the usual questions as to general bias.[3] 424 U.S. at 597.

[3] *Compare Ross with Ham* v. *South Carolina*, 409 U.S. 524 (1973), in which the Court had held that the Due Process Clause required the granting of the defendant's request for voir dire questions exploring racial prejudice because the black defendant was charged with possession of marijuana, was a civil rights activist, and contended that he had been framed because of his civil rights activities.

And in *Castaneda* v. *Partida*, 430 U.S. 482, 499 (1977), the Court rejected any presumption that a given ethnic group will *not* discriminate *against* members of their own group.

According to *Swain*, however, there is no type of case in which blacks *qua* blacks may not be summarily eliminated on the presumption that the prosecutor is merely seeking a "fair and impartial jury." The premise of *Swain* and the rarity of wholesale challenges to white venirepersons thus serve only to limit artificially the opportunity of blacks for participation in our system of justice, and to perpetuate an invidious proposition of racial inferiority that has been outlawed in virtually every area of public affairs—in employment, in education, in housing, in property rights. How unfortunate that the invidious proposition has been allowed to flourish in the administration of justice.

C. *State Court Developments*

In light of the near impossibility experienced by defendants in attempting to meet the requirements set by *Swain*, a small number of state courts have fashioned standards based on their state constitutions to guarantee to the defendant a trial before a jury that has not had cognizable groups eliminated by the discriminatory acts of the prosecutor. In most instances, the state court was influenced by the fact that at the time *Swain* was decided, the Supreme Court had not yet ruled that the guarantee of the Sixth Amendment of trial by an impartial jury was binding on the states through incorporation into the Due Process Clause of the Fourteenth Amendment.

The first such case was *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978). In *Wheeler*, the prosecutor

had peremptorily challenged every black person called from the venire, without any effort to challenge them for cause and with little or no questioning that could have disclosed any biases. The California Supreme Court ruled that the use of peremptory challenges to remove prospective black jurors on the sole ground of "group association" violated the defendant's right to a jury drawn from a representative cross section of the community, as guaranteed by Article I, Section 16 of the California Constitution ("Trial by jury is an inviolate right and shall be secured to all . . . ."). The court stated that while the constitutional provision did not grant the defendant a right to a jury that mirrored the demographic composition of the population, it did entitle him to "a petit jury that is as near an approximation of the ideal cross-section of the community as the process of a random draw permits." 583 P.2d at 762.

The *Wheeler* court stated that the defendant could establish a prima facie case by showing that the persons excluded were members of a cognizable group within the meaning of the representative cross-section rule, and that there was a strong likelihood that these prospective jurors were challenged not as a result of any specific bias but only because of their group association. Upon such a showing by the defendant, the burden shifts to the prosecution to justify its use of the peremptory challenge on specific bias grounds reasonably relevant to the case at hand. The prosecution's reasons need not rise to the level needed to sustain a challenge for cause. *Id.* at 764-65.

Wheeler was followed shortly by *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979), in which the prosecution had peremptorily challenged twelve of the thirteen black jurors drawn

from the panel. Following the lead of the California Supreme Court in *Wheeler*, the Massachusetts Supreme Judicial Court ruled that Article 12 of the Declaration of Rights of the Massachusetts Constitution, which guarantees the right to trial by jury of one's peers, protected the defendant against the prosecution's use of its challenges on racially discriminatory grounds.

In *State* v. *Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980), the Court of Appeals of New Mexico rejected a claim by a defendant that his constitutional rights had been violated when the prosecution used a peremptory challenge to excuse the one black member of the venire, holding that the defendant had not made out a prima facie case of discrimination. The court went on to state, however, that "improper, systematic exclusion by use of peremptory challenges can be shown . . . under the *Wheeler-Soares* rationale and supported by Article II, Section 14 of the New Mexico Constitution, where the absolute number of challenges in the one case raises the inference of systematic acts by the prosecutor." 612 P.2d at 718.

In New York, two courts ruled that the New York Constitution forbade the prosecutor's discriminatory use of his peremptory challenges. In *People* v. *Kagan*, 101 Misc. 2d 274, 420 N.Y.S.2d 987 (Sup. Ct. N.Y. County 1979), in which the defendants were Jewish, the trial court ruled that the prosecutor was forbidden to use his peremptories to challenge Jews simply because they were Jews. The court found, however, that the defendants had not established a prima facie case of such use. In *People* v. *Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739, in which the defendant was black, the Appellate Division, after "extensive and thoughtful analysis," *People* v. *McCray*, 57 N.Y.2d at 552 n.1, 457 N.Y.S.2d at 446 n.1 (Meyer, *J.*,

dissenting), ruled that the prosecution's use of all of its peremptory challenges to excuse all black venirepersons violated the New York Constitution. The appellate court quashed the results of the jury selection procedures and ordered a new trial.[4] Both *Kagan* and *Thompson* appear to have been overruled *sub silentio* by the New York Court of Appeals' ruling in *People* v. *McCray*. *See also People* v. *Payne*, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982), *rev'd*, 99 Ill. 2d 135, 457 N.E.2d 1202 (1983).

Most recently, in *State* v. *Neil*, Nos. 63,899, 63,933 (Fla. Sup. Ct. Sept. 27, 1984), the Florida Supreme Court "[b]elieving that it is time in Florida to hold that jurors should be selected on the basis of their individual characteristics and that they should not be subject to being rejected solely because of the color of their skin," slip op. at 1, held that Article I, section 16 of the Florida Constitution prohibits both the state and the defense from using peremptory challenges in any given case to exclude prospective jurors solely because of their race, *id.* at 8-10. The court ruled that the test set out in *Swain* is no longer to be used by Florida courts when confronted with an allegation of discriminatory use of peremptories.

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[4] The standard of appellate review suggested by the court in *People* v. *Thompson* differed somewhat from that suggested by the *Wheeler* and *Soares* courts. The *Thompson* court indicated that even if a significant number of black jurors had been peremptorily challenged, the trial court need not inquire into the prosecutor's reasons for those challenges if the trial court's own observations of the jury selection process indicated that the peremptories were properly exercised. 79 A.D.2d at 110-11, 435 N.Y.S.2d at 755. The court concluded that since the reasons underlying the use of peremptory challenges may "not [be] as readily apparent to those who were not in the position of the Judge who attended the *voir dire*," the exclusion of a significant number of black jurors would be "insufficient, in and of itself, to warrant reversal of a trial court's determination not to make inquiry" into the use of the challenges. *Id.* at 111, 435 N.Y.S.2d at 755; *accord State* v. *Neil*, Nos. 63,899, 63,933, slip op. at 6-8 (Fla. Sup. Ct. Sept. 27, 1984).

D. *Applicability of Swain's Equal Protection Analysis to the Present Case*

In light of (a) the criticisms of *Swain*, (b) the developments in Sixth Amendment doctrine since the decision of *Swain*, (c) the state court developments curtailing the use of peremptory challenges on a discriminatory basis, and (d) the intimations in the opinions joined by five Justices in connection with the denial of McCray's petition for certiorari that the time is drawing near for a reconsideration of *Swain*, both McCray and the State urge us to rule that *Swain* is no longer good law. While the assaults on *Swain* are not without considerable force, we are constrained to note that, on the question of the vulnerability of the prosecution's use of peremptory challenges to attack under the Equal Protection Clause, *Swain* is clear, direct, and unequivocal. It states that a defendant may not mount a successful equal protection challenge to the prosecution's racially discriminatory use of its peremptory challenges solely on the basis of the prosecution's act in a single case. Since McCray's contentions rest solely on the State's use of its peremptories in his own case, he does not meet the requirements set by *Swain*. We therefore decline to rest our decision in this case on equal protection principles.

We are not, however, required to read *Swain* as setting the standards for all other provisions of the Constitution. It is true that at the end of Part II of the *Swain* opinion, the Court stated that in light of the importance of the peremptory challenge system it could not hold that "the Constitution" required an examination into the prosecution's reasons for the exercise of such challenges. 380 U.S. at 222. And we note that at least one commentator has taken these words literally, infer-

ring that *Swain* has held the peremptory challenge "immune . . . from federal constitutional inquiry of any sort." *The Supreme Court, 1982 Term*, 97 Harv. L. Rev. 70, 194 (1983). We think it inappropriate and improvident to consider this reference out of the context of the opinion as a whole. All of the Court's constitutional analysis focused on the Equal Protection Clause. We do not believe the single general reference was intended to remove this focus.

Nor do we view *United States* v. *Newman*, 549 F.2d 240 (2d Cir. 1977), the only prior opinion of this Court addressing the prosecution's peremptory use of its challenges on a racial basis, as dispositive of Sixth Amendment issues. *Newman* was argued and decided on the basis of district-wide statistical data submitted in support of a due process theory. The Court disagreed with the use of district-wide data, noting that the community of which a jury is to represent a fair cross section is the division in which the defendant is tried, not the entire district. The Court held that *Swain* was the governing authority and that the statistical analysis was flawed, and concluded that the "due process claims made by the defendants in this case have no support in law nor do the facts alleged have support in the evidence." *Id.* at 250. We see no evidence in the *Newman* opinion that the parties presented any substantial argument that the government's racially discriminatory use of its peremptories in a given case might violate the Sixth Amendment.

Accordingly, we turn now to the Sixth Amendment.

III. The Sixth Amendment

The Sixth Amendment to the Constitution provides in pertinent part that "[i]n all criminal prosecutions,

the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), decided three years after *Swain*, the Supreme Court ruled that this provision is applicable to the states:

> Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.

Id. at 149 (footnote omitted). Many cases construing the scope of the states' responsibilities in light of the Sixth Amendment's guarantee were to follow.

A. *The Development of Sixth Amendment Doctrine As Applicable to the States*

In a long sequence of cases, the Supreme Court has faced such questions as whether the Sixth Amendment permitted the exclusion of blacks, women, and conscientious objectors from jury panels; whether jury verdicts of guilty could be less than unanimous; and whether juries could consist of groups smaller than the traditional twelve. The answers to these questions have varied, but the touchstone of each analysis has been whether the practice in question deprived the defendant of the possibility of a jury that represented a cross section of the community.

In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court considered whether the Sixth Amendment required that all juries consist of twelve persons, rather than six as permitted by Florida law for noncapital offenses. Noting

that *Duncan* v. *Louisiana* had described the rationale for a right to a jury trial as providing "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge," 391 U.S. at 156, the *Williams* Court stated that

> the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

399 U.S. at 100. The Court concluded that the twelve-person requirement was not of constitutional dimension and that a six-person jury was of sufficient size to comprise a cross section of the community. The Court stated that the number of persons on the jury should "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." *Id.*

In *Ballew* v. *Georgia*, 435 U.S. 223 (1978), the Court ruled that a jury of five was too small. Six Justices observed that so limited a number probably could not adequately include a cross section of the community. *See id.* at 239, 242 (opinion of Blackmun, *J.*, expressing "substantial doubt about the ability of juries truly to represent the community as membership decreases below six"); *id.* at 245 (opinion of White, *J.*: "a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments . . . ."); *id.* at 246 (opinion of Brennan, *J.*).

In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), the Court ruled that the Sixth Amendment did not prohibit the states from allowing conviction by verdicts of 11-1 or 10-2 rather than requiring unanimity. Four Justices observed that

> ". . . the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen . . . ." *Williams* v. *Florida*, *supra*, at 100. A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt.

406 U.S. at 410-11 (opinion of White, *J.*). Similarly a fifth Justice stated that "the Court has held that criminal defendants are entitled, as a matter of due process, to a jury drawn from a representative cross section of the community. This is an essential element of a fair and impartial jury trial." *Johnson* v. *Louisiana*, 406 U.S. 356, 378 (1972) (opinion of Powell, *J.*, concurring in the judgment in *Apodaca* v. *Oregon*).

In *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), which may have been decided on the basis of due process, rather than Sixth Amendment, principles (*see* Part III.B. *infra*), the Court considered a challenge to an Illinois statute that permitted the state to challenge for cause potential jurors who were opposed to capital punishment. Under the Illinois system, the jury not only decided guilt, but, if it found the defendant guilty, it determined

whether his sentence should be imprisonment or death. The Court reversed Witherspoon's conviction on the ground that it was

> self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments.

Id. at 518. The Court concluded that "in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of [persons who believe in that penalty] cannot speak for the community." *Id.* at 519-20 (footnote omitted).

In *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), the Court considered a statute that provided that no woman was to be selected for jury service unless she had filed with the clerk of the court a written declaration of her desire to serve. The result was that in the parish in which the petitioner was tried, although 53% of those eligible for jury service were women, no more than 10% of the venirepersons were women. The Court concluded that the provision violated the Sixth Amendment since it operated to exclude women from jury service and thus unduly restricted the possibility of a defendant's having a petit jury that represented a fair cross section of the community:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional

> or perhaps overconditioned or biased response of a judge. *Duncan* v. *Louisiana*, 391 U.S., at 155-156. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

419 U.S. at 530. The *Taylor* Court concluded that "[i]f the fair-cross-section rule is to govern the selection of juries, as we have concluded it must, women cannot be systematically excluded from jury panels from which petit juries are drawn." 419 U.S. at 533.

The Court cautioned that it did not mean to imply that petit juries actually chosen must mirror the community or reflect the various distinctive groups in the population. Its holding was not that the defendant was guaranteed a jury of a particular composition, but rather that he was entitled to a venire from which distinctive groups had not been systematically excluded. 419 U.S. at 538.

In *Duren* v. *Missouri*, 439 U.S. 357 (1979), the Court struck down a statute that exempted women from jury duty upon their request for exemption. The Court held that "such systematic exclusion of women that results in jury venires averaging less than 15% female violates the Constitution's fair-cross-section requirement." *Id.* at 360.

The Court's acknowledgement of the cross-section ideal in state trials is also reflected in many of its earlier rulings in federal cases. In *Glasser* v. *United States*, 315 U.S. 60 (1942), the Court analyzed the nature of the right to a jury trial in the context of the Sixth Amendment's strictures on the federal government and concluded that it would be impermissible to limit venirewomen to those who were members of specific civic organizations:

> [T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a "body truly representative of the community," and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.

315 U.S. at 86.

Similarly, in *Ballard* v. *United States*, 329 U.S. 187 (1946), the Court exercised its supervisory power to bar the exclusion of women from jury service in the federal courts, observing as follows:

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the im-

> ponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.

Id. at 193-94 (footnote omitted). And in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), a civil case, the Court held improper the routine exclusion from the jury venire of all persons who worked for a daily wage:

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups.

Id. at 220 (citations omitted).

More recently, in *Peters* v. *Kiff*, 407 U.S. 493 (1972), in which the Court remanded, on due process grounds, for a hearing on the allegations of a white defendant that blacks had been systematically excluded from the grand jury that indicted him and the petit jury that convicted him, three Justices elaborated as follows:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is

> not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. at 503-04 (opinion of Marshall, *J.*; footnote omitted). Even the three Justices who dissented from the judgment of the *Peters* Court

> completely agree[d] that juries should not be deprived of the insights of the various segments of the community, for the "common-sense judgment of a jury," referred to in *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968), is surely enriched when all voices can be heard.

407 U.S. at 510-11 (Burger, *C.J.*, dissenting).

Finally, we note that in none of these cases did the Supreme Court require the defendant to make a showing that the jury that resulted from the challenged practices was in fact a biased jury. If the Court found that the defendant had made a showing that the cross-section requirement had been violated, it concluded that he was entitled to relief or further proceedings simply on the basis of the violation of his Sixth Amendment right. *See, e.g., Taylor* v. *Louisiana*, 419 U.S. at 538-39 (Rehnquist, *J.*, dissenting).

B. *The Import of the Sixth Amendment For the Final Phase of the Jury Selection Process*

The jury selection process obviously does not end with the assembling of the venire, and it is the final phase of the process, the actual selection of the petit

jury, with which we are concerned here. Although, as discussed in Part II above, a few courts and commentators have concluded that peremptory challenges exercised at this stage may properly be subjected to the cross-section requirement,[5] a far larger body of case authority has developed in support of the proposition that the cross-section requirement of the Sixth Amendment does not extend to this final phase and thus has no applicability to the prosecution's exercise of its peremptory challenges.[6] The latter rulings are said to be mandated by the fact that most of the Supreme Court decisions invalidating the exclusion of cognizable groups in the jury selection process have focused on the selection of the venire rather than the selection of the petit jury, and by the Court's statement in *Taylor* v. *Louisiana*, 419 U.S. at 538, that there is no requirement that the petit jury actually reflect a cross section of the community.

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[5] *See Grigsby* v. *Mabry*, 569 F. Supp. 1273, 1285-86 (E.D. Ark.), *stay granted*, 583 F. Supp. 692 (E.D. Ark. 1983); *State* v. *Neil*, slip op. at 8; *People* v. *Wheeler*, 583 P.2d at 761-62; *Commonwealth* v. *Soares*, 387 N.E.2d at 513; *State* v. *Crespin*, 612 P.2d 716; Winick, *supra*, 81 Mich. L. Rev. at 62-66; Note, *supra*, 86 Yale L.J. at 1731-32.

[6] *See, e.g., United States* v. *Clark*, 737 F.2d 679 (7th Cir. 1984); *United States* v. *Thompson*, 730 F.2d 82, 85 (8th Cir. 1984); *United States* v. *Childress*, 715 F.2d 1313, 1319-20 (8th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 744 (1984); *Weathersby* v. *Morris*, 708 F.2d 1493, 1497 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 719 (1984); *People* v. *Williams*, 97 Ill. 2d 252, 454 N.E.2d 220, 232-33 (1983), *cert. denied*, 104 S. Ct. 2364 (1984); *People* v. *McCray*, 57 N.Y.2d at 545, 457 N.Y.S.2d at 442-43. *See also Gilliard* v. *Mississippi*, 104 S. Ct. 40, 40-44 (1983) (Marshall, *J.*, dissenting from denial of certiorari (collecting cases)); *State* v. *Neil*, slip op. at 4 n.3 (collecting cases); Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 360 (1982); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 Harv. L. Rev. 1770, 1780 (1979).

We agree entirely with the proposition that the defendant has no right to a petit jury of any particular composition. The random drawing of petit jurors from the venire is by its very nature inconsistent with any guarantee of a particular resulting composition. But we disagree with the conclusion of those courts that have reasoned that the lack of such a guarantee means that the Sixth Amendment has no implications for the process of selecting the petit jury from the venire. We think such a conclusion is belied by the Supreme Court's repeated emphasis on the cross-section requirement of the Sixth Amendment and the fundamental value judgments underlying that requirement.

We begin by analyzing the goal of the guarantee that the venire itself represent a fair cross section of the community. The venire *qua* venire is a body that, assuredly, gives service to the community by standing ready to serve on a petit jury if called upon to do so; but it is a group that takes no action and makes no decisions. No defendant has ever been tried before a venire; the venire is not the body that deliberates in the jury room; no defendant has ever been found guilty by a venire. If there is a Sixth Amendment requirement that the venire represent a fair cross section of the community, it must logically be because it is important that the defendant have the chance that the petit jury will be similarly constituted. The necessary implication is that the Sixth Amendment guarantees the defendant that possibility. It guarantees not that the possibility will ripen into actuality, but only the fair and undistorted chance that it will. We thus agree that the Sixth Amendment does not require any action to ensure that the representative character of the venire be carried over to the petit jury; we think the Amendment simply prohibits the state's

systematic elimination of the possibility of such a carry-over.

Our conclusion that the Sixth Amendment guarantees the defendant the possibility of a cross-sectional petit jury is supported by, for example, *Ballew* v. *Georgia*, 435 U.S. 223, in which there was no suggestion that the venire was improper. The Court held that the calling of only five persons from even a valid venire to form the petit jury was inconsistent with the Sixth Amendment, in part because so small a group had an unreasonably low possibility of comprising a cross section of the community. The state was not permitted to deal with the valid venire in a way that so limited the possibility that a fair cross section might be drawn.

We find even clearer support for the proposition that the process of selecting a jury from a proper venire is subject to constitutional scrutiny in *Witherspoon* v. *Illinois*, 391 U.S. 510, which focused squarely on the challenge stage of the proceedings. There was no implication that those who objected to the death penalty were excluded from the venire; the venire was validly constituted. The statute that was invalidated was one that permitted the state to challenge for cause any venireperson who opposed the death penalty, and thus to eliminate such persons as a group in the very last phase of the jury selection process. *Witherspoon* is thus irreconcilable with the notion that the challenge stage of jury selection is not subject to constitutional scrutiny. If the only constitutional requirement were that there be a fair cross section on the venire, with no concern for what followed, the challenges for cause in *Witherspoon* would have escaped review.

We note that it is not entirely clear whether *Witherspoon* was decided on Sixth Amendment grounds or on due

process grounds. The *Witherspoon* trial had occurred years before the Court's decision in *Duncan* v. *Louisiana* made the Sixth Amendment's jury trial requirements applicable to the states; and in *DeStefano* v. *Woods*, 392 U.S. 631 (1968), announced two weeks after *Witherspoon*, the Court ruled that *Duncan* was not to be applied retroactively. Nonetheless, the *Witherspoon* Court stated that "this jury fell woefully short of that impartiality to which the petitioner was entitled under the *Sixth* and Fourteenth Amendments." 391 U.S. at 518 (emphasis added). In any event, even if *Witherspoon* was decided under general principles of due process rather than under the Sixth Amendment, it would defy reason to believe that the incorporation of the Sixth Amendment into the Fourteenth *lessened* the amount of scrutiny to be given to the final phase of the state jury selection process.

In sum, the conclusion we draw from the Supreme Court cases is that whatever the nature of the state statute or practice may be (*e.g.*, granting exemptions from jury service as in *Duren*, or adjusting the size of the petit jury as in *Ballew*, or defining "cause" to challenge as in *Witherspoon*, or departing from the traditional requirement of unanimity as in *Apodaca*), and whatever the stage of the selection process that is subjected to that statute or practice (*e.g.*, selection of the venire as in *Taylor*, or selection of the petit jury as in *Witherspoon*, or the operations of the petit jury as in *Apodaca*), the state is not permitted by the Sixth Amendment to restrict unreasonably the possibility that the petit jury will comprise a fair cross section of the community.

C. *Peremptory Challenges and the Proper Scope of the Court's Focus*

We turn next to the question of whether and on what basis peremptory challenges, as contrasted with challenges

for cause, may be subjected to scrutiny under the Sixth Amendment. As noted above, some believe that *Swain* immunized peremptory challenges from all constitutional scrutiny, and indeed, it appears that *Swain's* extensive review of the history of the peremptory challenge system and its conclusions as to the importance of that system in American jury trials have created a myth that peremptory challenges are sacrosanct. We believe the proper view is that they are not.

First, as the review in *Swain* makes clear, the peremptory challenge is not rooted in the Constitution; it existed at common law, and it is now a creature of rule and statute. But it is not provided for in the Constitution of the United States, nor in any state constitution that we know of. It is an important right; it may be an invaluable right in certain circumstances; but it is not a right of constitutional dimension. As a matter of sound jurisprudence, therefore, when a defendant has made a prima facie showing that the prosecution's use of its peremptories conflicts with a fundamental right that is protected by the Sixth Amendment, it is the inscrutability of the peremptory challenge that must yield, not the constitutional right.

Nor does *Swain* stand for the proposition that the peremptory challenge is beyond scrutiny even under the Equal Protection Clause. Part III of the *Swain* opinion, although dictum, set forth the circumstances that a defendant would have to show in order to subject the prosecution's use of peremptories to inquiry by the court. Although the standards set by *Swain* have proven to be practically impossible to meet, they were nevertheless enunciated. Plainly, therefore, even the *Swain* Court did not believe that peremptory challenges are immune from

remedial judicial action should the defendant make a prima facie showing that they conflict with a constitutional right.

Finally, we see no meaningful distinction, for Sixth Amendment purposes, between a state's exclusion of identifiable groups from the petit jury by means of a statute or practice, as in *Witherspoon*, and the exclusion of such groups by means of the systematic action of the prosecutor, who is an agent of the state. The latter is equally state action and should be equally subject to scrutiny. Indeed, one of the rationales for according any right to a jury trial is that it provides "a hedge against the overzealous or mistaken prosecutor." *Taylor* v. *Louisiana*, 419 U.S. at 530; *see Duncan* v. *Louisiana*, 391 U.S. at 156. Plainly the hedge is blighted if the prosecutor is allowed arbitrarily to remove entire segments of the panel and thereby destroy any possibility that the jury may represent a fair cross section of the community.

For purposes of determining what a defendant must show in order to establish a prima facie case of a prosecutor's use of peremptory challenges in violation of the Sixth Amendment, we think the principal difference between *Swain's* equal protection analysis and proper analysis under the Sixth Amendment lies in the appropriate scope of the court's focus. The Sixth Amendment provides that the right of the accused to trial by an impartial jury shall exist in "*all* criminal prosecutions." (Emphasis added.) Thus, that Amendment protects each defendant who is to stand trial, not simply the last in a sequence of defendants to suffer the deprivation of an impartial jury. Accordingly, we construe the Sixth Amendment's provision to require the court to decide each case on the basis of the acts or practices complained

of in that very case, and not to require the defendant to show, as *Swain* requires for an equal protection claim, that those acts or practices have had undesirable effects in case after case. We confess that we are not sure why the Equal Protection Clause should protect only the last of a number of defendants to be subjected to discrimination, but we are sure that it is not sound to extend that proposition to the interpretation of a constitutional provision that is expressly directed to "all" criminal prosecutions.

Accordingly, we conclude that a defendant may appropriately subject to scrutiny under the Sixth Amendment the prosecution's use of its peremptory challenges on the basis of its actions in his own particular case.

D. *Impermissible Exclusions under the Sixth Amendment*

In addition to the Sixth Amendment's conception of the ideal jury as one that represents a cross section of the community, several principles provide guidance for determining whether an allegation of the systematic peremptory exclusion of blacks and Hispanics from the petit jury states a claim under the Amendment. First, the goal of jury selection is to assure that each juror is free from bias. By this we mean that he or she is likely to be able to decide the case solely on the basis of the evidence before the jury. *Swain* v. *Alabama*, 380 U.S. at 219. Further the notions that all persons who share an attribute, such as the same skin color, will *ipso facto* view matters in the same way, and that minority groups are less able than whites to decide the case solely on the basis of the evidence, are both fallacious and pernicious. "As

early as 1880, [the Supreme] Court recognized that blacks as a class are no less qualified to sit on juries than whites . . . ." *Duren* v. *Missouri*, 439 U.S. at 371 n.* (Rehnquist, *J.*, dissenting). Any notion that white persons can be objective in viewing a case on its merits and that blacks *qua* blacks cannot, is particularly objectionable. In a case where a black defendant has been charged with a crime that has aroused racial passions, one may believe that whites *qua* whites are more likely than black *qua* blacks to convict; this, however, does not bespeak a greater objectivity so much as it does a greater propensity to convict. Obviously, the responsibility of the state and its prosecutor is not to secure a conviction at all costs; it is to see that justice is done, and the constitutional wisdom is that justice is best served by a jury that represents a cross section of the community, not one from which cognizable groups have been systematically eliminated because of their group affiliation.

Accordingly, we conclude that the Sixth Amendment's guarantee of trial by an impartial jury allows the prosecution to exercise its peremptory challenges to excuse jurors to whom, on the basis of their personal history or behavior, some bias may be imputed; but it forbids the exercise of such challenges to excuse jurors solely on the basis of their racial affiliation.

IV. Procedures Under the Sixth Amendment

In setting forth the factors that a defendant must show in order to establish a prima facie case that the prosecution has used its peremptories in a way that violates the Sixth Amendment, we think it appropriate to adapt the Supreme Court's test for the establishment of a

prima facie case of a Sixth Amendment violation with respect to the venire, as set forth in *Duren* v. *Missouri*, 439 U.S. 357. There the Court stated as follows:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 364.

It is evident that the second factor stated by the *Duren* Court, *i.e.*, that the resulting group was in fact not representative of the community, is not applicable to the petit jury stage. The first and third factors, however, are plainly relevant and material. We conclude that in order to establish a prima facie violation of his right to the possibility of a fair cross section in the petit jury, the defendant must show that in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.

If the defendant establishes such a prima facie case, " ' "the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing

that permissible racially neutral selection criteria and procedures have produced the monochromatic result."'" *Castaneda* v. *Partida*, 430 U.S. 482, 494 (1977) (quoting *Washington* v. *Davis*, 426 U.S. 229, 241 (1976), which quoted *Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972)).

In order to rebut the defendant's showing, the prosecutor need not show a reason rising to the level of cause. There are any number of bases on which a party may believe, not unreasonably, that a prospective juror may have some slight bias that would not support a challenge for cause but that would make excusing him or her desirable. Such reasons, if they appear to be genuine, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the prosecutor's response and of being alert to reasons that are pretextual. *See, e.g.*, *People* v. *Hall*, 35 Cal. 3d 161, 672 P.2d 854, 858 (1983) (en banc) (reasons proffered by prosecutor for peremptorily excusing blacks were equally applicable to whites not excused; *held*, defendant's prima facie showing not rebutted). If the court determines that the prosecution's presentation is inadequate to rebut the defendant's proof, the court should declare a mistrial and a new jury should be selected from a new panel.

Plainly these principles and procedures require a modification of the way in which the peremptory challenge system works. The modification is required, however, only in those cases in which a defendant makes a prima facie showing that the prosecutor has used those challenges in a way that is inconsistent with the guarantee of the Sixth Amendment. In any case in which such a showing is not made, the prosecution may exercise its peremptory challenges without any inquiry into their bases. And where the court does inquire, after a prima

facie showing has been made, the prosecution need not show cause for the excuse of the jurors in question but only genuine reasons other than group affiliation. We would think the number of occasions in which a defendant would be able to make out a prima facie case that the prosecutor's use of peremptories was systematically excluding a cognizable group from the jury solely on the basis of the group's affiliation would be few; we would hope the number would decrease. In any event, this limited requirement for modification of the traditional, but nonconstitutional, system is a small price to pay for the vindication of a constitutional right.

Nor do we think the necessary procedures place an unreasonable burden on the court. The process of identifying discriminatory conduct and pretextual explanations is performed daily in the course of litigation under Title VII of the Civil Rights Act of 1964 and a host of other statutes. It should not be considered unduly burdensome, in those cases where a prima facie showing has been made, to scrutinize the prosecutor's actions when a defendant's life or liberty may be at stake.

Finally, we note that in states that have ruled that the prosecution's use of its peremptory challenges is subject to scrutiny under the state constitution, we have seen no indication in the reported authorities or the commentaries that the implementation of such scrutiny as has been required has created an undue burden for the prosecution or the courts. In *People* v. *Hall*, the California Supreme Court declined an invitation to overrule its five-year-old decision in *Wheeler*, stating that it had no empirical evidence that the *Wheeler* procedures had proven unworkable. 672 P.2d at 859 & n.11. And in the present case, the State advises us that in the two years between

the decision of the New York Appellate Division in *People* v. *Thompson*, holding that the racially discriminatory use of peremptories by the prosecutor was invalid under the New York Constitution, and the implicit overruling of that decision by the New York Court of Appeals in *People* v. *McCray*, the *Thompson* rule did not create any practical problems whatever.

V. Application of Sixth Amendment Analysis to the Present Case

Application of the foregoing principles to the present case poses two questions: first, whether McCray established a prima facie case; and second whether the State is entitled to a hearing at which it may present evidence to rebut that case. We answer both questions in the affirmative.

A. *McCray's Prima Facie Showing*

The district court correctly ruled that McCray had made a prima facie showing that the prosecutor exercised the State's peremptory challenges to exclude black and Hispanic jurors on the basis of their group affiliation. McCray's trial counsel objected during the voir dire and detailed the prosecutor's use of the State's challenges, which up to that point had eliminated all of the blacks and Hispanics drawn. He identified several minority venirepersons who were excused despite having proffered no discernible reason to believe that they would not be unbiased jurors, and one black who was excused despite having had an experience that one might think would make him identify more with a complaining witness than with a defendant. McCray's showing was ample to shift to the State the burden of coming forward with some reason other than group affiliation for the challenges.

We are not persuaded to the contrary view by the State's argument that one black venireperson was eventually seated as a jury alternate. Questions of possible tokenism aside, *see, e.g., Alexander* v. *Louisiana*, 405 U.S. 625 (1972); *Cassell* v. *Texas*, 339 U.S. 282 (1950), we note that the selection of that alternate did not occur until after McCray had challenged the prosecutor's use of eight of her eleven peremptories to rid the jury of all the blacks and Hispanics called to that point. McCray had established his prima facie case at the time of his first objection to the prosecutor's actions. The trial court should have inquired into the prosecutor's reasons for the use of the State's peremptories against the minority members of the venire and, in the absence of a response showing permissible reasons, a mistrial should have been ordered and the jury selection process begun afresh.

The question that remains is whether the record that now exists warranted the district court's conditional granting of the writ without further proceedings.

B. *The Need for a Hearing on the State's Proffer of Rebuttal*

The State advances two bases for its argument that even if McCray did make a prima facie showing that the prosecutor exercised the State's peremptories on the basis of race, the district court should not have granted the conditional writ of habeas corpus. First, it argues that the district court should have deferred to the trial court's "decision to credit" the prosecutor's denial that she had so used the State's peremptories. Alternatively, it contends that the district court itself should have held a hearing on the State's proffer of rebutting evidence. We reject the former contention but agree with the latter.

The State's first contention is governed by 28 U.S.C. § 2254(d), which requires the district court to defer to factual findings by the state court only if (1) they are evidenced by reliable written indicia, (2) the court's factfinding procedure was adequate to afford a full and fair hearing, and (3) the findings are fairly supported by the record. Here the district court was not required to accept the State's view that the state trial court made any finding that the prosecutor did not exercise the peremptory challenges impermissibly. The trial court made no such finding in its written opinion. Nor is such a finding reflected in any transcript or in any other writing in the record.

All that appears in the record is the trial court's statement in its written opinion, published nearly two months after the conduct of the voir dire, that the prosecutor denied having used the State's peremptories discriminatorily. Even that statement, however, is not supported by the record. The transcript of the argument and colloquy that followed McCray's objection to the prosecutor's actions during the voir dire reveals no statement whatever from the prosecutor. Further, it clearly appears from the record that the trial court refused to conduct any sort of hearing. Accordingly, the district court was not required to infer that the state court had found no racially discriminatory use of the peremptory challenges nor even to defer to the trial court's statement that the prosecutor had denied such use.

While the failure of the trial court to inquire into the prosecutor's reasons for the peremptory exclusion of minority venirepersons might well suffice to cause a state appellate court to order a new trial without further proceedings, *see, e.g., People* v. *Thompson*, 79 A.D.2d 87, 435

N.Y.S.2d 739, there are circumstances here that suggest that the district court should have held a hearing to conduct an inquiry into those reasons.

First, principles of federalism and comity suggest that a writ of habeas corpus not be granted freeing a state defendant or granting him a new trial without giving the state every opportunity to respond to the petitioner's allegations. Thus, in *Bermudez* v. *Reid*, 733 F.2d 18 (2d Cir. 1984), in which the state had repeatedly defaulted in its obligation to respond to the allegations of the petition, we reversed the district court's granting of the writ on the basis of those defaults. We ruled that the court was required to conduct a hearing into the allegations to determine whether the petitioner could make some factual showing that his federal rights had been violated, and that, notwithstanding the earlier inexcusable defaults, the state should be given notice of the hearing in order that the court might consider the petition on the basis of the best available evidence.

We see no basis here for departing from the principle established by *Bermudez*, especially since the State has not defaulted and has urged that it be allowed to present rebutting evidence. We realize that the State did not come forward with an affidavit by the ADA who conducted the McCray trials until after the district court had rendered its decision conditionally granting the writ. But we see no indication that the State intended to default in any way, and it could well have been that the State believed there was no immediate urgency to come forward with a factual showing in light of the uncertainty that the federal constitutional contentions advanced by McCray, which had theretofore been rejected by virtually every other court to consider them, would

be accepted, and the fact that McCray himself had requested, if those contentions were accepted, that a hearing be held. Further, we note that the ADA who tried McCray stated in her affidavit to the district court that she had offered to explain to the trial court her reasons for each challenge; that at that time she had notes relating to the voir dire; and that the trial court refused to permit her to present her reasons. While such a proffer by the ADA is nowhere reflected in the record, we do not know that it did not occur.

We recognize that more than four years have elapsed since the conduct of the voir dire in question, and that the State's practical burden of rebutting the prima facie showing made by McCray has increased with the passage of time. Nonetheless, in all the circumstances of this case, we think it appropriate for the district court to conduct a hearing into the State's proffered rebuttal of the prima facie case established by McCray.

CONCLUSION

We agree with the decision of the district court insofar as it ruled that McCray established a prima facie case that the State violated his rights under the Sixth Amendment by exercising its peremptory challenges to exclude black and Hispanic prospective jurors on the basis of their group affiliation. The order conditionally granting the writ is vacated and the matter is remanded for further proceedings consistent with this opinion.

MESKILL, *Circuit Judge*, dissenting:

I respectfully dissent.

Although the majority's effort to combat what it perceives to be a form of discrimination is well intentioned, the result reached is unworkable and contrary to the law of this and almost every other circuit. Until today's decision, federal appellate case law dealing with the racial makeup of juries was uniform; to establish a violation of the Constitution, the defendant had to prove a *systematic exclusion* of blacks from petit juries that extended over a number of cases. Absent such a showing, the objective existence or nonexistence of a "proper" reason for the prosecutor's use of a peremptory challenge was irrelevant because the "presumption in any particular case *must be* that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court." *Swain* v. *Alabama*, 380 U.S. 202, 222 (1965) (emphasis added).[1]

The majority recognizes that *Swain* is the starting point for any analysis of the alleged discriminatory use of peremptory challenges. The teaching of *Swain* is clear. After reviewing the nature and purpose of peremptory challenges and commenting on their importance in our system of justice, the Court stated:

> In the light of the purpose of the peremptory system and the function it serves in a pluralistic

[1] The majority refers on several occasions to the state's concession that the use of race as a factor in making peremptory challenges violates the Sixth and Fourteenth Amendments. However, the majority recognized that the state's concession of a possible equal protection violation was erroneous. I agree with them on that point, but I also find the state's concession of a possible Sixth Amendment violation to be erroneous. Moreover, given the precedent in this area, I find the state's concession to be incomprehensible from a legal viewpoint.

> society in connection with the institution of jury trial, we cannot hold that *the Constitution* requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.

380 U.S. at 222 (emphasis added).

While the majority finds *Swain* distasteful, it concedes that for purposes of McCray's equal protection claim *Swain* is controlling. However, in an attempt to circumvent *Swain*, the majority finds that a string of Sixth Amendment cases opens the door *Swain* so clearly closed. The majority's approach is contrary to the law established in a host of federal appellate court decisions, including the law of this Circuit.

In *United States* v. *Newman*, 549 F.2d 240 (2d Cir. 1977), decided after almost all of the Sixth Amendment cases on which the majority relies, we recognized the continued validity of *Swain*. Although *Newman* involved a due process claim, the Court was congnizant of Sixth Amendment standards, stating that the case before it concerned the defendants' right to "a fair and impartial jury and one which represents a fair cross-section of the community." 549 F.2d at 244. In rejecting the defendants' challenge of the prosecutor's use of peremptory challenges, the Court stated:

> Nor under the circumstances did the defendants under *any existing law* have the right to inquire into and interrogate the prosecutor about his reasons for peremptorily challenging the four Black veniremen in the jury pool. *Swain* v. *Alabama, supra,* is the governing authority on this matter.

549 F.2d at 246 (emphasis added).

Moreover, in *United States* v. *Danzey,* 476 F. Supp. 1065 (E.D.N.Y. 1979), a Sixth Amendment claim was brought under facts similar to those in the case before us. Indeed, the prosecutor in *Danzey* admitted: "I make it a practice to attempt to exclude as best I can all jurors . . . of the same ethnic background as the defendant." *Id.* at 1066. In rejecting the defendant's Sixth Amendment claim, Judge Nickerson found *Swain* and *Newman* controlling. We affirmed without opinion, 620 F.2d 286 (2d Cir. 1980), and in a concurrence in the denial of a petition for a rehearing *en banc,* four members of our Court stated that the "use of peremptory challenges based on a *group bias assumption* denies *no cognizable legal rights* 'in any particular case.'" *United States* v. *Danzey,* 622 F.2d 1065, 1066 (2d Cir.) (emphasis added, quoting *Swain,* 380 U.S. at 221), *cert. denied,* 449 U.S. 878 (1980). They went on to add "no relief is appropriate unless the offending *pattern is sufficiently general and pervasive* to support a clear inference of motivation or intent to discriminate against a particular racial or ethnic group." 622 F.2d at 1066 (emphasis added, citing *Newman,* 549 F.2d at 249-50). The majority should not so lightly disregard our prior decisions.

Even if the law of our Circuit were not clear, the overwhelming weight of authority from other circuits calls for a rejection of the majority's approach. At least

five circuits have rejected the notion that the Supreme Court's later Sixth Amendment decisions, particularly *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), have undercut *Swain*. *United States* v. *Clark*, 737 F.2d 679, 681-82 (7th Cir. 1984) (practical considerations support prevailing view that *Swain* is still controlling law); *Willis* v. *Zant*, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3907 (U.S. June 18, 1984) (Sixth Amendment analysis of *Taylor* does not extend to petit juries); *United States* v. *Whitfield*, 715 F.2d 145, 146-47 (4th Cir. 1983) (appellant made Sixth Amendment claim, *Swain* cited as controlling); *United States* v. *Childress*, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 52 U.S.L.W. 3511 (U.S. Jan. 9, 1984) (*Taylor's* Sixth Amendment analysis does not overrule *Swain*); *Weathersby* v. *Morris*, 708 F.2d 1493, 1497 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3510 (U.S. Jan. 9, 1984) (*Taylor* analysis does not extend to petit juries). Moreover, three other circuits have recently reaffirmed the validity of *Swain*, although it is unclear from their decisions whether Sixth Amendment claims were advanced. *United States* v. *Canel*, 708 F.2d 894, 898 (3d Cir. 1983), *cert. denied*, 52 U.S.L.W. 3265 (U.S. Oct. 3, 1983) ("We decline to change the rule that neither side need justify the use of peremptory challenges."); *United States* v. *Jenkins*, 701 F.2d 850, 859-60 (10th Cir. 1983) (*Swain* called for rejection of appellant's claim which only challenged conduct at his trial); *United States* v. *Durham*, 587 F.2d 799, 801 (5th Cir. 1979) (defendant must show *systematic* exclusion of blacks from petit juries).

The weight of authority against the majority's *Swain*/Sixth Amendment analysis exists for good reason: the Sixth Amendment cases are not inconsistent with

Swain. Like *Swain*, the Sixth Amendment decisions that involve exclusion of prospective jurors focus on systematic exclusion. *See, e.g., Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (state may not challenge for *cause* potential jurors opposed to death penalty; possibly due process rather than Sixth Amendment grounds); *Taylor* v. *Louisiana*, 419 U.S. 522, 533 (1975) ("women cannot be systematically excluded from jury panels from which petit juries are drawn"); *Duren* v. *Missouri*, 439 U.S. 357, 360 (1979) (the "systematic exclusion of women that results in jury venires averaging less than 15% female violates the Constitution's fair-cross-section requirement").

Moreover, the Sixth Amendment cases do not show a retreat from *Swain*. For example, in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), on which the majority relies, Justice White stated:

> All that the Constitution forbids, however, is *systematic exclusion* of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been *systematically excluded*. See *Swain* v. *Alabama*, 380 U.S. 202, 208-209 (1965) . . . .

406 U.S. at 413 (plurality opinion; emphasis added). In addition, in *Taylor*, the Court made it clear that it imposed

> no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, *Fay*

> v. *New York*, 332 U.S. 261, 284 (1947); *Apodaca* v. *Oregon*, 406 U.S. at 413 (plurality opinion); but the *jury wheels, pools of names, panels,* or *venires* from which juries are drawn must not *systematicclly exclude* distinctive groups in the community and thereby fail to be reasonably representative thereof.

419 U.S. at 538 (emphasis added). I therefore find the majority's analysis of the interaction between *Swain* and Sixth Amendment precedent unpersuasive.

Even if we could decide this case in a vacuum, removed from the precedent against the majority's approach, there are a number of practical factors that militate against the majority's decision. First, the majority gives far too little weight to the peremptory challenge's long history as a tool used to ensure an impartial jury.[2] An attorney who uses her challenges to exclude from the jury members of the same race, religion, sex, occupation, class or ethnic background as her opponent's client is not invidiously discriminating against members of that group. Rather, the attorney is trying to ensure that her client faces a jury that at least will be unbiased and at best will be receptive to her view of the case. We must remember that at the same time the defense counsel, who may well have more challenges, is engaged in the same process. The result of this adversarial system should be

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[2] The majority places great emphasis on the absence of a constitutional provision allowing peremptory challenges. While there is no constitutional requirement for peremptory challenges, the challenge is designed to secure an impartial jury, which is the overriding Sixth Amendment objective. The Supreme Court has recognized its importance in holding the peremptory challenge to be "a necessary part of trial by jury," *Swain*, 380 U.S. at 219, and "essential in contemplation of law to the impartiality of the trial," *Lewis*, 146 U.S. at 378. Thus, I believe that the majority has unduly minimized the significance of the peremptory challenge.

an impartial jury. As the Supreme Court recognized in *Swain*, the nature of this system means that peremptory challenges are often

> exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried.

380 U.S. 220-21 (footnotes omitted).

Although the majority finds such group based assumptions "fallacious" and "pernicious," an attorney has not only a right but an obligation to challenge a prospective juror who *may* be biased, even if the basis of her belief is a broad generalization, which may not in fact be true. Thus, the actual issue in this case is not whether a prosecutor may systematically exclude members of some group from sitting on juries but whether a prosecutor may use peremptory challenges to exclude individual members of a group because she believes that *in that particular case* they *may* be biased in favor of members of the defendant's group.[3] A competent prosecutor will only

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[3] At times in its opinion the majority attempts to cast the case before us as one involving systematic exclusion. Indeed, based on the Sixth Amendment guarantee of an impartial jury in "all criminal cases," the majority states that a systematic exclusion

[Footnote continued on following page]

strike a member of the defendant's group in situations where she believes the possibility of that individual having a group bias—even if very small—is greater than the possibility of some other prospective juror having a bias. Where the group based assumption against members of the defendant's group is outweighed by some other assumption, the prosecutor will turn to the other assumptions; for instance, if a black college student is being tried in a draft registration case, the prosecutor may prefer to challenge a white social worker rather than a black veteran. By banning the use of such assumptions, the majority has severely limited the effectiveness of the peremptory challenge. *See also King* v. *County of Nassau*, 581 F.Supp. 493, 500-01 (E.D.N.Y. 1984).

In addition, the majority fails to confront the obvious implication of its ruling for defense attorneys. As the Seventh Circuit recently recognized, "[i]t would be hard to argue that only a defendant should be allowed to

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[Footnote continued from previous page]

may be established in an individual case. Majority Op. at 7004, 7009. I find it difficult to accept its interpretation of systematic. In *Duren* v. *Missouri*, 439 U.S. 357 (1979), the Court defined the term systematic in the following passage: "[Petitioners'] undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." 439 U.S. at 366. Thus, to establish systematic exclusion, even in Sixth Amendment cases, the defendant must show case after case exclusion. If in the case before us the defendant could make this showing, *Swain* would outlaw the practice and there would be no need to look to the Sixth Amendment. However, such an analysis does not satisfy the majority because it finds a *Swain* violation too difficult to prove. Thus, it redefines systematic and develops an easier test. What the majority ignores in doing so is that perhaps the reason *Swain* violations have not been proved in an "acceptable" number of cases is that they do not exist in an acceptable number of cases.

challenge racially motivated peremptory challenges. . . . As it cannot be right to believe that racial discrimination is wrong only when it harms a criminal defendant, and not when it harms the law abiding community represented by the prosecutor . . . ." *Clark*, 737 F.2d at 682. *See also Florida* v. *Neil*, Nos. 63,899, 63,933 (Fla. Sept. 27, 1984) (Alderman, *J.*, dissenting); *Commonwealth* v. *Soares*, 377 Mass. 461, 489-90 n.35, 387 N.E.2d 499, 517 n.35, *cert. denied*, 444 U.S. 881 (1979); *People* v. *Wheeler*, 22 Cal.3d 258, 282 n.29, 583 P.2d 748, 765 n.29 (1978).

This very problem, and the negative impact it will have for defendants, was foreseen in *Newman*.

> The right to peremptory challenges is of great importance, both to the Government and to the defendants—but mostly to the defendants, because they are personally involved in the result of the trial and for this reason usually have more of the peremptory challenges than the Government. These challenges provide one of the most effective assurances that a party will have a fair and impartial jury. . . . Once, however, a plaintiff or prosecutor is required to submit to interrogation concerning his reasons for making a peremptory challenge, it will probably not be long before defendants will be required to do likewise. This, in all likelihood, would spell the end of peremptory challenges; and Blacks and other recognizable minority groups would thereby suffer a major loss in the removal of one of the greatest safeguards the law has provided for a fair trial.

549 F.2d at 250 n.8.[4]

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[4] The extension of the majority's restrictions to the defense will create problems. The prosecution will then have every right, for

[Footnote continued on following page]

The majority also fails to confront the virtual limitlessness of its Sixth Amendment analysis. To establish a prima facie case under the majority's standard, the defendant need only show "(1) the group alleged to be excluded is a *cognizable group* in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venireperson's group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented." Majority op. at 7007 (emphasis added). Thus, a group based assumption may not be used to exclude a member of any Sixth Amendment "cognizable" or "distinctive group." "Distinctive groups" under the Sixth Amendment are those that "are sufficiently numerous and distinct" that if they are systematically excluded from jury venires, "the Sixth Amendment fair-cross-section requirement cannot be satisfied." *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979) (quoting *Taylor*, 419 U.S. at 531). For example, in any given community, people opposed to the death penalty may be a "distinctive group" and thus under the majority's analysis they may not be peremptorily challenged.[5] It also appears

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[Footnote continued from previous page]

example, to contend that a black defendant may not use his peremptory challenges exclusively against whites. This not only doubles potential delay and requires all attorneys to keep records of who they are challenging and why, it may also mean that a minority defendant will have to challenge some *minority* prospective jurors peremptorily in order to rebut a charge of discrimination. Furthermore, the defense is often entitled to more peremptory challenges than the prosecution is, *see, e.g.*, Fed. R. Crim. P. 24(b). Consequently, in order to avoid an inference of discrimination the defense may be forced to challenge more minority prospective jurors than the prosecution would. This is even more "pernicious" than the result the majority condemns.

[5] Such a result is contrary to the holdings of at least two circuits which have considered this issue. *Dobbert* v. *Strickland*, 718

[Footnote continued on following page]

that men, women, old people, young people, laborers, professionals, Democrats, Republicans, etc. are distinctive groups. Therefore, no group based assumptions may be used to eliminate any member of these groups. Such a change is not simply "a modification of the way in which the peremptory challenge system works," Majority op. at 44. It effectively eliminates the peremptory challenge for all but the most frivolous reasons (people who wear gray, smile, or wear contact lenses).

I believe the result the majority reaches spells the end of the peremptory challenge as an effective jury selection tool. Again a return to *Swain* is appropriate. As the Supreme Court stated in *Swain*, the peremptory challenge is by definition "an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." *Swain*, 380 U.S. at 219 (quoting *Lewis* v. *United States*, 146 U.S. 370, 378 (1892)). It added: "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, 380 U.S. at 220. The Court concluded by recognizing that once the prosecutor is required to explain her challenge,

> [t]he challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at

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[Footnote continued from previous page]

F.2d 1518, 1524-25 (11th Cir. 1983) (although under *Witherspoon* state may not challenge prospective jurors opposed to death penalty for cause, state may peremptorily challenge those prospective jurors); *Jordan* v. *Watkins*, 681 F.2d 1067, 1070 (5th Cir. 1982) (*Witherspoon* inapplicable to situation where prospective juror was peremptorily challenged). Thus, to the extent that the majority relies on *Witherspoon*, Majority Op. at 7001-2, its result is again contrary to the law of other circuits.

> a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. And a great many uses of the challenge would be banned.

380 U.S. at 222.

The continued validity of the Court's concern in *Swain* was recently pointed out by the Seventh Circuit. In expressing its doubt that *Swain* has been undercut by the Sixth Amendment cases, that court recognized the practical considerations that weigh against such an analysis. First among these was "[t]he potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." *Clark*, 737 F.2d at 682. The court also observed that if the prosecutor is faced with having to defend his peremptory challenges,

> it is hard to see how the peremptory challenge . . . will survive. Whenever counsel alleged that his opponent had a racial or similar type of motivation in exercising a peremptory challenge (whether he used that challenge to exclude a white or a black—and it would have to be one or the other—or, extending the principle as one could hardly resist doing, a man or a woman, a Jew or a gentile, etc.) the opponent would have to come forward with a reason for wanting to exclude the juror. In other words he would have to provide good cause, or something very close to it; and the peremptory challenge would collapse into the challenge for cause.

Id.

The majority, however, steadfastly asserts that it is not imposing a cause standard. However, the line it is attempting to draw is at best gossamery. Moreover, any

inquiry into the motivation of the prosecutor entails a tremendous burden. As Judge Wexler recently explained:

> Even assuming the existence of a clear theoretical rule regarding what types of peremptory challenges are legal, enormous difficulties would arise from any attempt to implement such a rule in practice. A great deal of time, effort and expense would be necessary to attempt to determine whether any given peremptory challenge is legal. Any such determination would entail the extremely difficult task of assessing the internal motives of the attorneys. It might also require an inquiry by the Court into the ethnic or religious backgrounds of prospective jurors, thereby promoting the very emphasis on such factors which the rule seeks to avoid. . . . Most important of all, attorneys, confronted with a rule completely or partially restricting their right to act with the internal motive of helping their clients when making peremptory challenges, will be under enormous pressure to lie regarding their motives. Such a rule will foster hypocrisy and disrespect for our system of justice. Indeed, it is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal.

King v. *County of Nassau*, 581 F. Supp. 493, 501-02 (E.D.N.Y. 1984) (holding *Swain* is still controlling law).[6]

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[6] The majority believes that its prima facie test will be difficult to meet. I find its belief unwarranted. To establish a prima facie case in their case-by-case approach, the defendant will only have to show that members of the distinctive group were repeatedly challenged. Thus, if a venire contains three members of a "cognizable group" and all three are challenged or maybe two of three are challenged, a prima facie case appears to be established. I find it hard to believe that this result will occur in only a "few" cases. Moreover, the impact of the threat of having to justify every challenge will be significant, *see supra* note 4.

In sum, the majority reaches its conclusion only by rejecting the overwhelming weight of authority and by minimizing the burdens that its result will place on the court and the litigants. Although it is offended by any group based assumptions, it fails to recognize that in a particular case such assumptions are not illogical and may weigh heavily with the attorney attempting to select a jury. By acting on these assumptions, the attorney is not invidiously discriminating against members of the group excluded, be they blacks, whites, men, women, Catholics or Jews. Rather the attorney is using his best judgment and acting within an adversarial system designed to create an impartial and unbiased jury, which is, after all, the overriding Sixth Amendment goal. The majority's attempt to fine tune this system, even though well intentioned, is bound to cause more harm than good.

I would vacate the order of the district court granting the petition for a writ of habeas corpus and remand with directions to dismiss the petition.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

83 C 4406

MICHAEL MCCRAY,

Petitioner,

— against —

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

NEW YORK CIVIL LIBERTIES UNION
(Steven R. Shapiro, Esq., of counsel)
New York, New York
for petitioner

ELIZABETH HOLTZMAN, District Attorney,
Kings County
(Barbara D. Underwood, Esq., of counsel)
Brooklyn, New York
for respondent

Memorandum and Order

NICKERSON, District Judge

Michael McCray brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, who is black, claims that the prosecutor at his state court trial used her peremptory challenges in a racially discriminatory way and that his conviction by a jury so chosen violates his rights under the sixth and fourteenth amendments to the United States Constitution.

I

Petitioner, whose sentence has been stayed by an order of this court pending the decision on his petition, was convicted of Robbery, First Degree and Robbery, Second Degree in the Supreme Court of the State of New York, Kings County, on April 28, 1980. This was petitioner's second trial, the first having ended in a mistrial when the jury was unable to agree on a verdict. Allegedly, the vote at the first trial was nine to three in favor of conviction; according to the affidavit of petitioner's trial counsel, the three voting for acquittal were the only blacks on the jury.

It is undisputed that at the second trial the prosecutor used seven peremptory challenges against blacks, one against a Hispanic, and three against whites. Petitioner contends that the eight minority jurors thus challenged were the only ones on the jury panel and that the resulting jury was composed entirely of whites. Respondent asserts that the prosecutor may have challenged not three whites but four and that one black juror was selected as an alternate. The trial judge could not recall whether there were any black jurors. The record does not resolve these disputes; nor, as respondent's affidavit points out, does it reveal how many blacks or Hispanics were in the jury panel, how many defense counsel excluded by his own peremptory challenges, or how many either side excluded for cause.

In any event, defense counsel moved in the course of jury selection for a mistrial or in the alternative for a hearing to inquire into the prosecutor's use of her peremptory challenges. He accused the prosecutor of systematically excluding blacks and Hispanics from the jury, and noted that one of the blacks so excluded had stated during voir dire that a relative or close friend was a victim of a crime. According to the trial court's opinion denying these motions, *People* v. *McCray*, 429 N.Y.S.2d 158, 159

(N.Y. Sup. Ct., Kings Co. 1980), the prosecutor denied excusing jurors on the ground of race. The trial court denied defendant's motion, on the same ground, to set aside the verdict, and the Appellate Division affirmed without opinion.

The New York Court of Appeals affirmed the conviction in a 4-3 decision, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982). That court relied upon *Swain* v. *Alabama*, 380 U.S. 202 (1965) in rejecting petitioner's federal claims under the sixth and fourteenth amendments and refused to construe the analogous provisions of New York's Constitution more expansively.

The Supreme Court denied McCray's petition for a writ of *certiorari* on May 31, 1983, *McCray* v. *New York*, 103 S. Ct. 2438 (1983). Justices Marshall and Brennan dissented in an opinion of Justice Marshall. *Id.* at 2439. Justices Stevens, Blackmun and Powell voted to deny *certiorari* but stated in an opinion of Justice Stevens that they did not disagree with Justice Marshall's appraisal of the "importance of the underlying issue—whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they will be biased in favor of other members of the same group." *Id.* at 2438. However, they believed that "further consideration of the substantive and procedural ramifications of the problem by other courts" would enable the Supreme Court "to deal with the issue more wisely at a later date." *Id.* Justice Stevens' opinion noted that "there is presently no conflict of decision within the federal system" and that the problems of judicial review of peremptory challenges were being addressed by the courts of the two states whose supreme courts have held state constitutional rights to be violated by discriminatory use of peremptory challenges. *Id.* at 2439, citing *People* v. *Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) and *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499,

cert. denied, 444 U.S. 881 (1979). The opinion concluded that "it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives futher study before it is addressed by this Court." 103 S. Ct. at 2439.

Petitioner moved the New York Court of Appeals for reargument in light of the Supreme Court's disposition of his case. The court denied the motion without opinion on July 12, 1983. McCray then filed this petition for relief pursuant to 28 U.S.C. § 2254.

If *Swain* v. *Alabama*, *supra*, is good law, petitioner's argument fails. But both petitioner and respondent urge the court to reconsider that case and to conclude that the sixth and fourteenth amendments prohibit the use of peremptory challenges to exclude potential jurors solely on the basis of race. Respondent opposes granting the writ, however, on the ground that on the record in this case petitioner did not make a showing sufficient to warrant a mistrial or a hearing on his claim that the prosecutor's use of peremptory challenges was racially motivated.

It is unusual, to say the least, for a district court to reexamine a Supreme Court case squarely on point. Moreover, the expressed willingness of five Justices to reconsider the *Swain* decision was perhaps not intended to apply to a collateral attack on the very conviction the Court was addressing. But surely there is some invitation implicit in Justice Stevens' opinion for the lower courts to engage in such reconsideration, and that invitation was not restricted to the state courts, as is evidenced by the opinion's reference to the absence of a "conflict of decision within the federal system" as a reason for postponing the Supreme Court's consideration of the issue. In the light of that language and of the position of respondent, this court concludes that it should address itself to the merits of the *Swain* decision.

II

The defendant in the *Swain* case was black and was convicted by an all-white jury. He contended that the historic underrepresentation of blacks on jury panels in the county and the prosecutor's use of peremptory challenges to eliminate the blacks who were on the panel in his case constituted racial discrimination in violation of the equal protection clause of the fourteenth amendment. While acknowledging the settled principle that total exclusion of blacks from jury panels, or token inclusion, is forbidden, the Court rejected the defendant's argument and suggested that suspected group affinity was an acceptable basis for the use of peremptory challenges. The Court noted, without disapproval, that such challenges are "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty." 380 U.S. at 220-21.

The Court established a presumption "that the prosecutor is using the State's challenges to obtain a fair and impartial jury" so weighty that it could not be "overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." "Any other result," the majority believed, "would establish a rule wholly at odds with the peremptory challenge system as we know it." *Id.* at 222.

Essentially, the Court decided that the use of peremptory challenges could not be examined in any particular case without a statistical showing of repeated discriminatory use of such challenges in other cases in a locality. Only if "the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . . with the result that no Negroes ever serve on petit juries," *id.* at 223, could a particular defendant make out a *prima facie* case of discrimination.

Petitioner concedes that he cannot satisfy the *Swain* test. Indeed, it is hard to see how he could do so even if blacks were systematically excluded by peremptory challenges from all juries in Kings County. Many *voir dires* are, like McCray's, not recorded, and the transcripts are not likely to reveal the race of prospective jurors anyway. The practices in Kings County are not unusual in this respect, and apparently there have been only two cases since the *Swain* case was decided in 1965 in which a defendant has successfully established systematic exclusion. *U.S.* v. *Childress*, 715 F.2d 1313, 1316 (8th Cir. 1983).

As noted by Justice Marshall, *McCray* v. *New York*, *supra*, 103 S. Ct. at 2440 (Marshall, J., dissenting), the *Swain* opinion has been thoroughly criticized, not least because it provides no remedy for the first victims of discrimination in a particular jurisdiction, no matter how plain the facts might be in the particular case. *See, e.g.*, *United States* v. *Danzey*, 476 F. Supp. 1065 (E.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir.), *cert. denied*, 449 U.S. 878 (1980).

Moreover, the coherence of the *Swain* opinion depends upon two assumptions whose validity has been at least diluted since 1965. The first is that no federally guaranteed right is implicated by the use of peremptory challenges based solely on presumed group affinity, even when the group in question is racial. Under this analysis, the Constitution prohibits a strategy of keeping blacks off juries entirely but is indifferent to a situation in which no blacks ever sit on juries in cases in which the defendant is black.

The Court's sixth amendment cases since 1965 announce principles inconsistent with this position. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), made the sixth amendment's jury trial provisions binding on the states for the first time. In *Taylor* v. *Louisiana*, 419 U.S. 522, 528

(1975), the Court reviewed its major sixth amendment decisions and concluded that "[t]he unmistakable import of this Court's opinion, at least since 1940 . . . is that the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial." The defendant in that case was male and successfully attacked a state law that prohibited women from jury service unless they had previously filed a written declaration of a desire to serve on a jury. The practical effect of this system was to exclude women almost totally from jury panels.

It is true that the *Taylor* decision, like those addressing the total exclusion of blacks from jury venires, speaks directly to the composition of the jury pool rather than to the ultimate composition of the jury in any particular case. Indeed, the Court specifically cautioned "that in holding that petit juries must be drawn from a source fairly representative of the community and reflect the various distinctive groups in the population we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.* at 538.

While it is obvious that parties "are not entitled to a jury of any particular composition," *id.* (citations omitted), it is another thing to assert that the prosecutor in a case involving a black defendant may use peremptory challenges solely on the basis of an assumption of racial affinity in order to produce an all-white jury. The extreme version of such a proposition would be to find acceptable a practice of excluding blacks automatically from jury panels in cases involving black defendants.

The equal protection clause prohibits racial discrimination not only because race is almost always irrelevant but also because distinctions based on race are invidious. *See Loving* v. *Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to

eliminate all official state sources of invidious racial discrimination in the States." (citations omitted)); *see also Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) ("[R]acial classifications that stigmatize . . . are invalid without more." (citations omitted)). No compelling governmental purpose justifies a prosecutor's use of peremptory challenges solely on the basis of race.

But even if rights under only the sixth amendment were at stake, it seems plain that "[t]he right to a jury drawn from a fair cross-section of the community is rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury." *McCray* v. *New York*, *supra*, 103 S. Ct. at 2442 (Marshall, J., dissenting). To permit a prosecutor to remove jurors solely on the ground of race on the theory that members of one race have a potential affinity with the other members of that race is almost inevitably to allow the party identified with the majority to obtain a jury with affinity to that majority. He "can altogether eliminate the minority from the jury, while the defendant is powerless to exclude majority members since their number exceeds that of the peremptory challenges available." *Commonwealth* v. *Soares*, 377 Mass. 461, 487-88, 387 N.E.2d 499, 516 (1979), *cited with approval in People* v. *McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982) (Meyer, J., dissenting).

The integrity of the *Swain* opinion's second critical assumption, that inquiry into a prosecutor's motives in a particular case "would establish a rule wholly at odds with the peremptory challenge system as we know it," 380 U.S. at 222, has also been eroded by later developments. Two state supreme courts have in recent years articulated antidiscrimination rules under their own state constitutions and fashioned procedures to avoid turning all challenges into challenges for cause. *Commonwealth*

v. *Soares*, 377 Mass. 461, 389 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *People* v. *Wheeler*, 22 Cal.3d 263, 583 P.2d 748 (1978); *see also State* v. *Crespin*, 94 N.M. 486, 612 P.2d 716 (1980) (adopting the *Wheeler-Soares* test under the New Mexico Constitution but finding no systematic discrimination).

The *Wheeler* case decided that "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community" under the California Constitution. 583 P.2d at 761-62. Similarly, the *Soares* opinion proscribed "exercise of peremptory challenges to exclude members of discrete groups, solely on the basis of bias presumed to derive from that individual's membership in the group[,]" 387 N.E.2d at 516.

Both these decisions established a substantially similar procedural remedy. Under the *Wheeler* decision, the "presumption . . . that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground[,]" 583 P.2d at 762, may be rebutted by a *prima facie* showing of discrimination. This may be done by making as complete a record of the circumstances as feasible, establishing that the persons excluded are members of a "cognizable group" discrimination against which is prohibited, and by showing "from all the circumstances of the case . . . a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." 583 P.2d at 764. The court indicated that, for example, "the party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group." *Id.*

Once a *prima facie* showing is established, the burden shifts to the other party to show that he exercised the

challenges "on grounds that were reasonably relevant to the trial or its parties or witnesses[,]" *id.* at 765, rather than on grounds of group bias alone. But "[t]he showing need not rise to the level of a challenge for cause." *Id.* If the court finds that the burden of justification is not sustained as to any of the questioned challenges, their presumptive validity is rebutted and the venire must be quashed. *Id.*

III

This court concludes that the rule of the *Swain* case, which five members of the Supreme Court have invited the courts to reconsider, should be modified. The equal protection clause should be construed to prohibit a prosecutor's exercise of peremptory challenges to exclude blacks solely on the basis of race in any case. If, as petitioner here alleges, the prosecutor at his trial exercised peremptory challenges solely on the basis of race, his sixth and fourteenth amendment rights were violated. The court does not decide the application of this holding to exclusion on a basis other than race, to counsel's use of peremptory challenges in civil cases, or to other questions which the facts of this case do not present.

The procedure adopted by the California Supreme Court in the *Wheeler* case is sensible and a useful model in fashioning the appropriate remedy. Even if all the relatively minor factual uncertainties in the record are resolved in respondent's favor, the record still makes out a *prima facie* case of discrimination. McCray is black and the victim of the crime is white; at the time of the motion for a mistrial the prosecutor had exercised seven of her eleven peremptory challenges against blacks; one of those so challenged had even stated on *voir dire* that a close friend or relative had been a victim of a crime. The trial court should have required the prosecutor to offer some reason other than race alone for each of these

challenges. The trial judge should then have determined whether any of the challenges were in fact based on race alone; if they were, the court should have quashed the venire.

The petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is granted unless petitioner is afforded a new trial within 60 days. So ordered. Execution of the sentence is stayed for a period of fifteen days from the entry of the order to enable petitioner to apply to the Court of Appeals for a further stay.

Dated: Brooklyn, New York
December 19, 1983

/s/ .....
EUGENE H. NICKERSON, *U.S.D.J.*

Office-Supreme Court, U.S.
FILED
APR 1 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1426

IN THE

United States Supreme Court

OCTOBER TERM, 1984

ROBERT ABRAMS, Attorney General of the State of New York,
Petitioner,

—v.—

MICHAEL MCCRAY,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STEVEN R. SHAPIRO
New York Civil Liberties Union
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New York, New York 10036
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Attorney for Respondent

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a prosecutor's use of peremptory challenges to exclude all black and hispanic jurors in a criminal case is consistent with the defendant's right to be tried by a jury drawn from a representative cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments?

2. Whether this Court's holding in Swain v. Alabama, 380 U.S. 202 (1965), forbids a finding that a prosecutor's use of peremptory challenges to exclude all black and hispanic jurors in a criminal case violates equal protection absent statistical evidence establishing a pattern and practice of such exclusions and, if so, should that holding now be modified to prohibit intentional race discrimination?

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Respondent Michael McCray submits this brief in opposition to the petition for certiorari seeking review of the judgment entered in this action by the United States Court of Appeals for the Second Circuit on December 4, 1984.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York is reported at 576 F.Supp. 1244 (1983). The opinion of the United States Court of Appeals for the Second Circuit is reported at 750 F.2d 1113 (1984). The opinion of the Second Circuit declining to reconsider the panel decision en banc is not yet reported. It is, therefore, included as

an appendix to this brief.[1]

JURISDICTION

Respondent acknowledges that the petition for certiorari was timely filed and that this Court's jurisdiction has been properly invoked under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Michael McCray is a young black man who was convicted by an all white jury of first and second degree robbery based solely on identification testimony.

The robbery occurred in downtown Brooklyn during the evening of November 15, 1978. Philip Roberts, a local art student, had just withdrawn twenty dollars from an automatic bank machine when he was surrounded

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1 The en banc order was issued by the Second Circuit on March 4, 1985, the same date that the petition for certiorari was filed in this Court.

by several youths, pushed into the vestible of an apartment building and robbed at gunpoint. McCray was arrested three weeks later when Roberts, who is white, picked him out while cruising the neighborhood in a police car. No one else was ever arrested for the crime. McCray had never been arrested before and has not been arrested since.[2]

Two trials then ensued. The first trial ended in a hung jury with three black jurors in favor of acquittal.[3] The second trial ended in conviction and concurrent sentences of 2-6 years on the charge of first degree robbery and 1-1/2 to 4-1/2 years on the

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2 McCray has remained free on bail during his post-conviction proceedings.

3 Throughout this litigation, petitioner has contended that only two of three minorities on the initial jury voted to acquit.

charge of second degree robbery.

In the process of selecting a jury for the second trial, the prosecution exercised either eleven or twelve peremptory challenges.[4] Eight of those challenges were used to excuse the only minority members drawn for the jury panel: seven blacks and one hispanic.[5]

Asserting that the prosecutor's action violated the federal Constitution as well as New York State law, respondent moved for a mistrial or, alternatively, for an inquiry to determine whether the prosecutor's use of her

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4 The record is ambiguous on the exact total of peremptory challenges used by the prosecution.

5 Contrary to petitioner's suggestion, Pet. at 4, there is no indication in the record that defense counsel challenged any minority jurors. Indeed, McCray's trial attorney submitted an affidavit to the district court, which stated: "I do not recollect challenging any [minority jurors], and I recollect [the prosecutor] challenging all."

peremptory challenges was based, as it appeared, exclusively on race.[6] Those motions were denied by the trial judge and voir dire continued.

The jury that convicted McCray was composed entirely of whites. After conviction McCray moved for a new trial, alleging again that the use of peremptory challenges to create an all white jury violated his right to "a jury of his own peers" under "our Constitution." That motion, too, was denied by the trial judge, who concluded on the basis of this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965), that the use of peremptory challenges

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6 In support of his motion, defense counsel pointed out that the minority jurors excluded by the prosecution shared nothing in common except their race. One black juror was excluded by the prosecution even though his relative had been a crime victim -- a fact that would normally be thought to favor the prosecution.

in a particular case is immune from inquiry. Neither decision by the trial judge contains any finding on the critical question of whether the prosecutor actually utilized her peremptory challenges to exclude minority jurors. Indeed, the trial judge considered that question so legally irrelevant that he never sought any explanation for the undisputed fact that every black and hispanic on the jury panel was peremptorily excused by the prosecutor.[7]

On direct appeal, McCray's conviction was affirmed without opinion by the Appellate Division, 84 A.D.2d 769, 444 N.Y.S.2d 972 (2d Dept. 1981), and in a 4-3 decision by the New

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7 Petitioner incorrectly asserts that the trial judge's written decision on respondent's motion for a mistrial found as a fact that the prosecutor's use of her peremptory challenges was not race-based. Pet. at 4. Given his view of the law, the trial judge considered that question of no import whatsoever. 104 Misc. 2d 782, 429 N.Y.S.2d 158 (Sup.Ct. Kings Co. 1980).

York Court of Appeals. 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982). The majority dismissed McCray's federal claim by relying on Swain and then refused to "depart[] from this holding" in construing New York's own Constitution.

McCray's petition for certiorari was denied by this Court on May 31, 1983. __ U.S. ___, 77 L.Ed.2d 1322 (1983). Justices Marshall and Brennan dissented from the Court's decision. Id. at 1323. In addition, three other members of this Court explained in a separate concurring opinion that their vote to deny certiorari reflected a desire for the lower state and federal courts "to serve as laboratories in which the issue receives further study before it is addressed by this Court." Id. (concurring opinion of Justices Stevens, Blackmun and Powell).

Following an unsuccessful effort to obtain reargument from the New York Court of

Appeals in light of this Court's opinions, 60 N.Y.2d 587, 467 N.Y.S.2d 1031 (1983), McCray brought the present action for a writ of habeas corpus in the Eastern District of New York pursuant to 28 U.S.C. §2254. The district court's decision to grant a conditional writ rested on two independent holdings. 576 F.Supp. 1244 (1983). First, the district court ruled that the Equal Protection Clause "prohibits racial discrimination not only because race is almost always irrelevant but also because distinctions based on race are invidious." Id. at 1248. Second, the district court held that the racially discriminatory use of peremptory challenges is inconsistent with a defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community. Id.

The district court scrutinized the record and found that "[e]ven if all the

relatively minor factual uncertainties in the record are resolved in [the prosecution's] favor, the record still makes out a prima facie case of discrimination." Id. at 1249. Petitioner's post-judgment motion for a federal court hearing to examine the use of peremptory challenges during a state court voir dire almost four years earlier was rejected by the district court in a brief order.

In an exhaustive opinion, the Second Circuit affirmed the district court's key holding that the prosecutor's use of peremptory challenges on racial grounds is unconstitutional. 750 F.2d 1113 (1984). Unlike the district court, however, the Second Circuit based its decision entirely on

the Sixth Amendment.[8]

Judge Kearse carefully examined this Court's Sixth Amendment rulings and concluded that, "whatever the stage of the selection process . . . the state is not permitted by the Sixth Amendment to restrict unreasonably the possibility that a petit jury will comprise a fair cross section of the community." Id. at 1129. The Second Circuit also upheld the district court's finding that a prima facie case had been established by unrebutted evidence that the prosecutor eliminated every potential minority juror. Id. at 1133.

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8 The Second Circuit decision can hardly be viewed as an endorsement of Swain. With evident reluctance, Judge Kearse wrote: "While the assaults on Swain are not without considerable force, we are constrained to note that, on the question of the vulnerability of the prosecution's use of peremptory challenges to attack under the Equal Protection Clause, Swain is clear, direct, and unequivocal." 750 F.2d at 1123-24.

The Second Circuit disagreed with the district court's refusal to grant a hearing, however. Citing "principles of federalism and comity," the case was remanded to the district court for a hearing on the prosecution's "proffered rebuttal of the prima facie case established by McCray." Id. at 1134.

That hearing, which petitioner sought, has never been held. Instead, petitioner has chosen to seek certiorari on constitutional issues that are not disputed. The fact that petitioner and respondent both disagree with the premises of Swain apparently played a role in the Second Circuit's decision not to reconsider en banc the panel opinion. (A.3-4). As noted by Judge Newman:

> [T]he appropriateness of en banc reconsideration is undermined by the lack of adversity between the litigants on the central issue in this case: The prosecutor agrees with the defendant

> that the state may not systematically use peremptory challenges against Blacks and Hispanics in the absence of reasons unrelated to race or national origin. The only dispute presented by the prosecutor is whether such reasons exist in this case, a matter the panel has returned to the District Court for determination.

For similar reasons, the petition for certiorari should be denied. No one doubts that the issues raised by this case are extremely important. But this is neither the case nor the time to review such important constitutional questions.

REASONS FOR DENYING THE WRIT

I. THE PARTIES AGREE ON THE CRITICAL LEGAL ISSUES RAISED BY THIS CASE

Petitioner has presented four questions for this Court's review. The first two questions raise legal issues that are not disputed by the parties. The third question involves factual matters that do not merit this Court's immediate attention. And the fourth question is entirely derivative of the first three. In short, none of the questions proposed by petitioner is sufficient to invoke this Court's discretionary jurisdiction.

Understandably enough given the decision below, petitioner's first question is whether the use of peremptory challenges to disqualify jurors on racial grounds violates the fair cross-section requirement of the Sixth Amendment. See Taylor v. Louisiana, 419 U.S. 522 (1975). The Second Circuit answered that

question in the affirmative, and both petitioner and respondent agree with the Second Circuit's result. This consensus on the critical constitutional issue presented by the petition for certiorari renders this case inappropriate for review. See New Jersey v. T.L.O., ___ U.S. ___, 82 L.Ed.2d 881, 882 (1984)(Stevens J., dissenting from reargument order). The significance of the constitutional issue and its potential impact on the administration of justice throughout the country only reinforces the importance of a truly adversarial presentation.

Likewise, the parties agree on the second question presented -- whether Swain ought to be modified to permit an equal protection attack upon the use of peremptory challenges in a particular case, assuming, of course, a proper evidentiary showing. This Court need not and should not reach out to decide constitutional issues that are not

contested. "The fact that it would be convenient for the parties and the public to have promptly decided whether the [practice] assailed is valid," Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring), is simply not a basis for certiorari.[9]

The third question proposed by petitioner challenges the finding that a prima facie case of racial discrimination has been established. While the existence of a prima facie case is a matter of genuine dispute, the dispute is primarily factual. As this

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9 The prudential considerations underlying the certiorari decision are separate and distinct from the case or controversy requirements of Article III. Petitioner's ongoing desire to put respondent in jail clearly creates Article III jurisdiction. INS v. Chadha, ___ U.S. ___, 77 L.Ed.2d 317, 337 (1983). Legally, the parties disagree over the existence of a prima facie case and the proper allocation of the burden of proof.

Court has often noted: "We do not grant a certiorari to review evidence and discuss specific facts," United States v. Johnston, 268 U.S. 220, 227 (1925), especially where the finding of fact has been confirmed by two courts below. Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). Here, the district court's finding of a prima facie case, 576 F.Supp. at 1249, was expressly affirmed by the Second Circuit. 750 F.2d at 1133.

Finally, petitioner asks this Court to decide whether the Second Circuit opinion correctly allocates the burden of proof between the parties. That issue, however, cannot be reached without first deciding the undisputed question of whether or not a hearing is required. Petitioner's effort to separate procedure from substance is thus unsuccessful.

The procedural concerns identified by petitioner may well be significant, but they should not be decided now and they should not be decided in the first instance by this Court.

II. THE CONSTITUTIONAL ISSUES RAISED BY THIS CASE SHOULD BE FURTHER EXPLORED BY THE LOWER COURTS PRIOR TO REVIEW BY THIS COURT

In denying the petition for certiorari filed in this case two years ago, three members of this Court stressed "that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." 77 L.Ed.2d at 1322 (concurring opinion of Justices Stevens, Blackmun and Powell). The Second Circuit decision below marks the beginning, not the end, of that period of exploration by the

federal court system.

Because the Second Circuit was deciding a particular case on particular facts, it inevitably left many undecided questions. It did not announce whether its constitutional holding extends to defense counsel as well as the prosecutor; it did not specify which "cognizable groups" other than blacks and hispanics are embraced within the fair cross-section requirement of the Sixth Amendment; and it did not anticipate many procedural issues that will undoubtedly arise once hearings are held in light of its decision.[10]

As a matter of sound judicial policy, this Court should wait until the lower courts have had an initial opportunity to grapple with these difficult questions. First, this

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10 Many of these questions were specifically identified by this Court as needing further consideration. 77 L.Ed.2d at 1323 n.*.

Court will undoubtedly benefit by the considered judgment of other tribunals. Second, the passage of time will provide this Court with an empirical base on which to rest its ultimate decision.[7]

Swain proceeded on the assumption that the system of peremptory challenges could not survive even a minimal inquiry into the prosecutor's motives. That assumption is only now being tested. While that test is underway, review by this Court would be premature.

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7 Some conflict among the Circuits, and between the state and federal courts, is almost inevitable during a period of experimentation. In this specific context, such conflict is not a reason for granting certiorari. To the contrary, it merely confirms that this Court is obtaining the percolation it desired before addressing a difficult constitutional question.

III. IMPORTANT CONSTITUTIONAL ISSUES SHOULD NOT BE DECIDED ON A CONTESTED FACTUAL RECORD

As matters now stand, this case has been remanded to the district court for a hearing to determine whether any discrimination actually occurred during jury selection at McCray's trial. On the present incomplete record, a constitutional adjudication by this Court is unnecessary and unwise.

Petitioner does not contend that the remand itself represents a constitutional injury. Indeed, petitioner concedes the propriety of an inquiry into the prosecutor's use of peremptory challenges once a prima facie case of discrimination is established. Any concern this Court might have about the burden of such an inquiry can be better assessed after a hearing is held.

The guiding principle of judicial restraint was summarized by Justice Jackson

in Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948):

> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

See also Board of Education v. Pico, 457 U.S. 853, 883-84 (1982)(White, J., concurring); Dombrowski v. Eastland, 387 U.S. 82 (1967).

These observations apply with equal force here.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: New York, New York
March 27, 1985

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL McCRAY,

Plaintiff-Appellee,

v. : 84-2026

ROBERT ABRAMS,

Defendant-Appellant.

A request for an in banc vote having been made by one of the active judges, and a poll of the judges in regular active service having been taken, a majority of the Court has voted not to reconsider the decision in banc.

WILFRED FEINBERG
Chief Judge

Dated: New York, New York
March 4, 1985

JON O. NEWMAN, Circuit Judge, concurring in denial of rehearing in banc:

The holding in this case is that the Constitution prevents the State of New York from systematically using its peremptory challenges against Black and Hispanic members of the jury venire in the absence of some plausible reason, not based on race or national origin, for doing so. The case is remanded for determination of whether such reason exists. The decision is important, both because of what it holds and because of the issues it raises for the future concerning the permissible use of peremptory challenges. Among these are whether the prosecution is similarly limited with respect to group-based challenges against persons identified other than by race or national origin, whether the remedy of striking the

venire is mandatory or only an option available to the defendant, and whether similar limitations on the exercise of peremptory challenges apply to a defendant. Language in the opinion of the panel majority touches on some of these issues.

In some circumstances, in banc reconsideration of a case of this magnitude would be warranted. Doing so would afford the full Court an opportunity to determine whether to endorse the holding, whether the constitutional principle underlying such a holding is the fair trial guarantee of the Sixth Amendment or the equal protection guarantee of the Fourteenth Amendment, and whether any authoritative guidance should now be given the trial courts concerning the unresolved issues raised by the panel ruling. However, the appropriateness of in banc reconsideration is undermined by the lack of adversity between the litigants on the

central issue in this case: the prosecutor agrees with the defendant that the State may not systematically use peremptory challenges against Blacks and Hispanics in the absence of reasons unrelated to race or national origin. The only dispute presented by the prosecutor is whether such reasons exist in this case, a matter the panel has returned to the District Court for determination.

In light of the prosecutor's litigating stance, this is not the case in which to determine the issues implicated by the panel's holding. Those issues can be expected to arise in future litigation, to be properly framed by adverse litigants, and to be carefully considered and resolved by future panels, and, if appropriate, by the full Court.

One of the most grievous assaults on the perception and substance of criminal justice is the trial of a Black defendant by an

all-White jury from which eligible Blacks have been excluded by action of the state because they are Black. The panel's holding imposes a constitutional bar upon state efforts to obtain such a pernicious result. In banc reconsideration of that holding, uncontested by litigants, is not warranted.

VAN GRAAFEILAND, Circuit Judge, concurring in the dissenting opinion of Judge Winter:

I concur fully in the dissent of Judge Winter. A decision that places defense attorneys in a position where, in order to avoid a claim of inadequate representation, they feel compelled to contest every exercise of a peremptory challenge by the prosecution on the ground that it is based on race, color, creed, sex or age, should have the support of more than two judges.

McCray v. Abrams, #84-2026
petition for en banc

WINTER, Circuit Judge, with whom VAN GRAAEFEILAND and MESKILL, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel opinion is in my view a paradigm case for in banc consideration. It can hardly be denied that the issues raised are of "exceptional importance" within the meaning of Fed. R. App. P. 35(a). The decision, rendered by a sharply divided panel, is without federal precedent and alters the very nature of peremptory challenges by compelling scrutiny of the motive underlying the exercise of such challenges. Because it is a constitutional decision, it affects the manner in which juries are selected in every criminal case in the state or federal courts within this circuit.

The effects are likely to be dramatic.

For example, many federal courts presently permit only a limited voir dire of prospective jurors thus leaving prosecutors with little to go on in exercising peremptory challenges other than the membership of such a juror in a "cognizable group." Such membership, however, is an improper criterion for the exercise of such a challenge under the panel opinion. Major changes in the present practice of selecting juries may thus be necessary.

The consequences of this decision might seem less serious if the Supreme Court of the United States were likely to review this particular case. However, it appears that the "losing party," the Brooklyn District Attorney, sought the ruling in question and will not seek review in the Supreme Court. Indeed, she has praised the ruling as a "landmark decision," National L.J., Dec. 7, 1984 at 46, col. 1, and in a letter to the

editor of the New York Times, took credit for the panel decision, N.Y. Times, Dec. 21, 1984, at A43, col. 6. The present decision thus will become final upon the denial of rehearing, and all trial courts within this circuit will be obliged to comply with it.

Judge Newman concurs in the denial of rehearing on the grounds that the lack of adversity between the litigants limits the precedential effect of the panel decision solely to challenges based on race or national origin. It appears to be his position that the panel decision went farther than was necessary in light of the agreement among the parties that the equal protection clause applied. He concludes, therefore, that the rationale of the panel majority is not binding on succeeding panels. I do not share that view.

If the lack of adversity with regard to the equal protection clause undermines the

precedential effect of the panel decision, it does so in its entirety. A concession as to applicable law by a party to litigation does not bind parties to subsequent litigation. Had the panel simply accepted the concessions without regard to whether they were necessitated by or consistent with existing law, its decision would not be of any significance for future cases. In contrast, the panel decision has precedential effect precisely because the majority made an independent determination as to which concessions were consistent with existing law and which were not. [1]

I cannot agree, therefore, that future panels are free to ignore the rationale of

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[1] To the extent Judge Newman's concurrence in the denial of rehearing raises the issue of the appropriateness of the panel's addressing such far-reaching issues in a case lacking in adversity, he underlines the need for in banc consideration.

the panel decision. Judge Kearse's opinion laid out in great detail the reasons justifying the result reached. Briefly stated, it reasoned that the equal protection clause does not prohibit "the prosecution's racially discriminatory use of its peremptory challenges . . . in a single case," McCray v. Abrams, 750 F.2d 1113, 1124 (2d Cir. 1984), but that the sixth amendment prohibits peremptory challenges which exclude from a particular petit jury "a cognizable group in the community . . . on the basis of the individual venirepersons' group affiliation," id. at 1131-32. Judge Newman disagrees with this rationale albeit he would reach the same result. I would suggest that the only viable remedy for such a disagreement is to rehear the decision in banc, not to discard the rationale in the next case heard by a different panel. A circuit with thirteen active judges which sits in many different

panels cannot construct a coherent jurisprudence, or maintain a spirit of collegiality and courtesy among its members, if carefully considered decisional rationales may be routinely ignored by successive panels.

I therefore dissent from the denial of rehearing in banc.

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No. 84-1426

IN THE

United States Supreme Court

OCTOBER TERM, 1984

ROBERT ABRAMS, Attorney General of the State of New York,
Petitioner,

—v.—

MICHAEL MCCRAY,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF

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Respondent Michael McCray submits this supplemental brief in support of his motion for an order granting the writ of certiorari in this case, and consolidating this case for purposes of oral argument with Batson v. The Commonwealth of Kentucky, No. 84-6263.

PROCEDURAL BACKGROUND

This motion represents a shift in respondent's position on the petition for certiorari. Previously, respondent had urged this Court not to grant certiorari despite the conceded importance of the constitutional issue raised by the petition. Specifically, respondent had argued that the question of whether a prosecutor could use peremptory challenges to exclude all potential minority jurors in a criminal trial was a matter of such significance that it should not be addressed by this Court until some of the difficult matters of

definition and implementation were first considered by the lower courts. In making this point, respondent merely echoed a suggestion first articulated by three members of this Court on an earlier petition for certiorari in this same case. McCray v. Abrams, ___ U.S. ___, 77 L.Ed.2d 1322, 1323 (1983) (concurring opinion of Justices Stevens, Blackmun and Powell).

In addition, respondent initially opposed certiorari on the ground that the parties to this case agree on the unconstitutionality of peremptory challenges exercised solely on the basis of race. Notwithstanding the obvious existence of a case and controversy under Article III, it was respondent's position at the time that prudential considerations counselled against a decision until this Court had an opportunity to hear and consider both sides of the argument.

On April 22, 1985, this Court agreed to

decide the question of whether the prosecutor's use of peremptory challenges to exclude all potential minority jurors in a criminal case violates the Sixth and/or Fourteenth Amendments by granting certiorari in Batson v. The Commonwealth of Kentucky, No. 84-6263. No decision has yet been announced on the petition for certiorari in the present case.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD BE GRANTED AND THIS CASE ARGUED IN TANDEM WITH BATSON

Because this Court has agreed to decide the constitutionality of race-based peremptory challenges, respondent's earlier objections to the grant of certiorari have clearly evaporated. Any concern that this Court might not have before it an advocate for the current constitutional rule barring any inquiry into the use of race-based peremptory challenges in a

particular case has been alleviated by the position of the respondent in Batson, who stongly argues for the continuing validity of this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965). Moreover, the order granting certiorari in Batson eliminates the prospect of a prolonged period of experimentation with a new constitutional rule by the lower courts.

Having granted certiorari in Batson, this Court should grant certiorari in the present case as well and consolidate the two cases for purposes of oral argument. Respondent appreciates the Court's desire to avoid needless duplication. Nevertheless, joint consideration of Batson and this case will materially assist the Court in its deliberations.

This is particularly so with regard to the procedural issues raised by the petition in this case. Batson comes to this Court as a

direct appeal from a criminal conviction in which the defendant's attack upon the prosecutor's use of peremptory challenges was rejected at every level below. Of necessity, therefore, the petition in Batson focuses on the threshhold issue of whether the use of peremptory challenges in a given case is absolutely immune from any judicial inquiry.

McCray comes to this Court in a totally different posture. The decision has already been made by the Second Circuit that some judicial inquiry is required and the dispute between the parties has concentrated on the contours of that inquiry, including the ingredients of a prima facie case and the proper allocation of the burden of proof.

Here, as elsewhere, questions of substance and procedure are inextricably intertwined. For that reason, as well as the interest in judicial economy, both questions should be

decided together. The latter set of procedural issues is presented far more clearly by the McCray case.

By hearing the two cases together, this Court will also have the benefit of a broader array of facts against which to formulate its constitutional ruling. The district court and the circuit court have each found a prima facie case of race discrimination in McCray. Furthermore, the record in McCray contains evidence that at least one minority juror was excused by the prosecution although his relative had been a crime victim, a revelation that would normally be thought to favor the prosecution. The documented use of racial stereotypes as an overriding consideration in trial strategy is surely a fact that this Court should consider in making its judgment.

In addition, by hearing the two cases together this Court will have an opportunity to explore two very different prosecutorial

views on the use and abuse of peremptory challenges. The clash between petitioner in McCray and respondent in Batson cannot help but illuminate the ultimate legal issue. This Court will also gain the opportunity to question the Kings County District Attorney about her practical experience during the period when the Swain rule was not being applied in New York. Those laboratory results offer the possibility, at least, of an empirical basis for this Court's final decision that is not duplicated by any other party now before the Court.

Finally, Michael McCray should not be left in the position of having his fate decided by the outcome of another case. That consequence may be unavoidable for other defendants still litigating the issue of peremptory challenges in the lower courts. McCray's case, however, is pending in this Court. Under the circumstances, he can and should be heard.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted, and this case should be consolidated for purposes of oral argument with Batson v. The Commonwealth of Kentucky, No. 84-6263.

Respectfully submitted,

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April 30, 1985